SUPREME COURT, U. S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973 NO. 73-1146

IN RE: GRAND JURY INVESTIGATION
PHILIP CHARLES TESTA,
Witness

PHILIP CHARLES TESTA,
Appellant

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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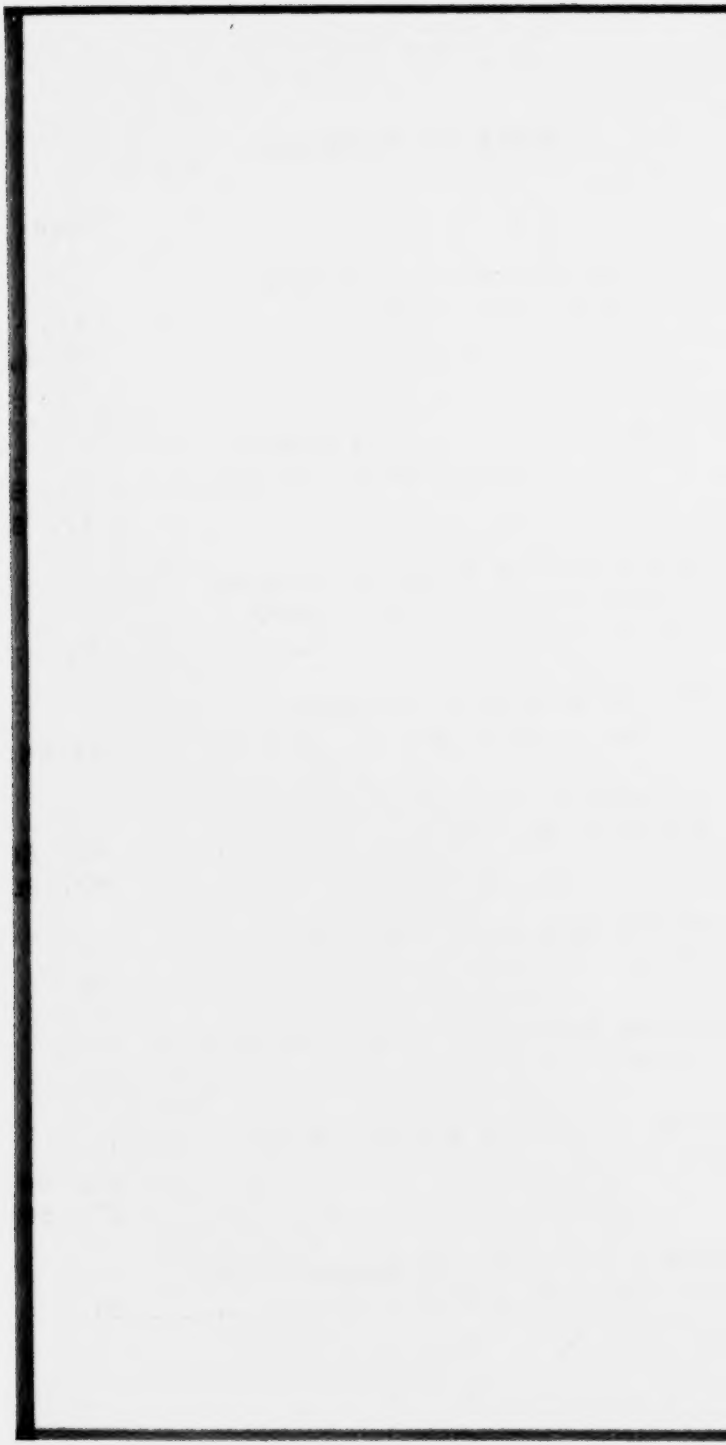

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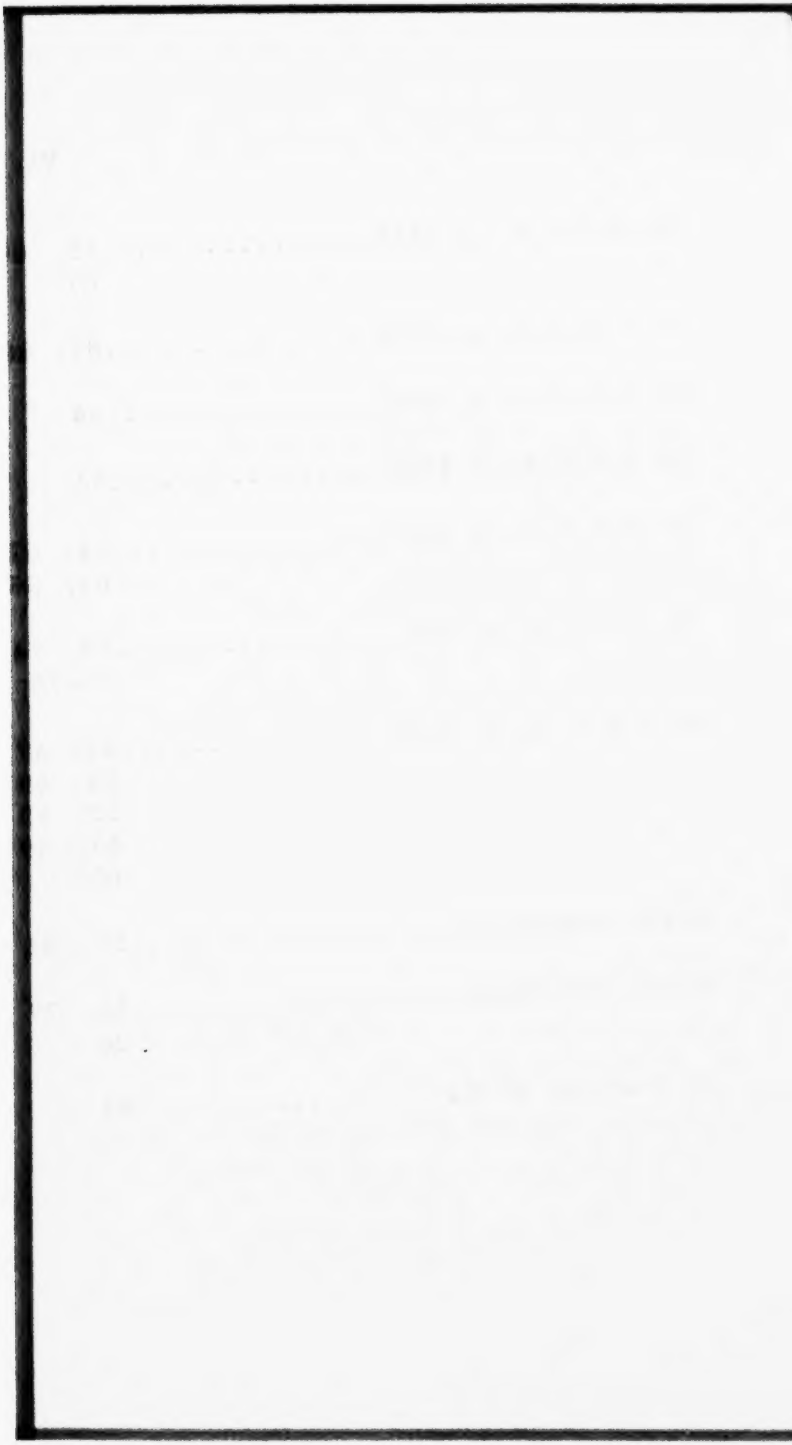
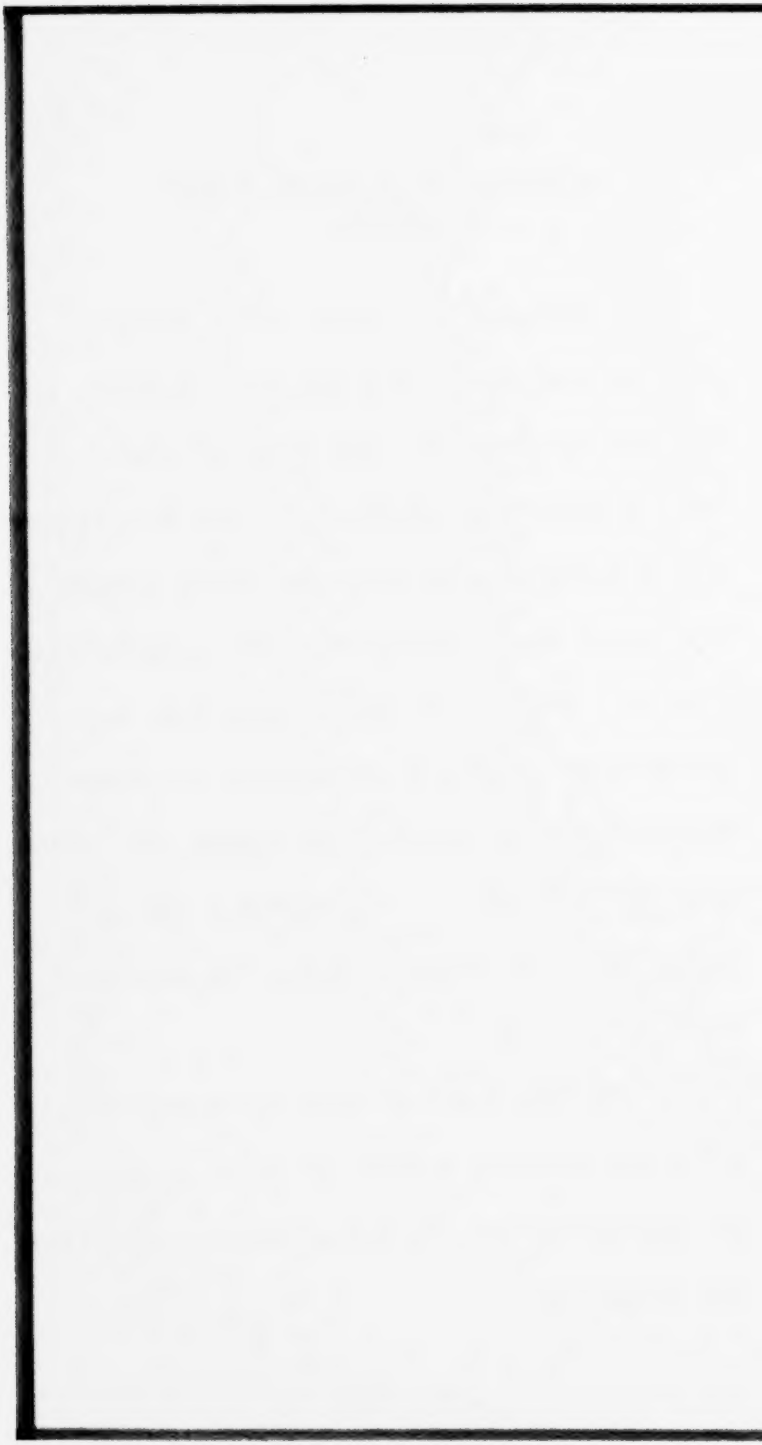


DISCUSSION OF LOWER COURT OPINIONS

Although District Court Judges Bechtle and Davis did not file formal written opinions at the time of their orders granting immunity to the Petitioner and holding him in contempt, both judges explained the reasons for their decisions orally. Therefore, Petitioner has appended the relevant statements of Judge Bechtle at the hearing on August 22, 1973 (see pp to , infra.) and of Judge Davis at the September 12 hearing (pp. to).

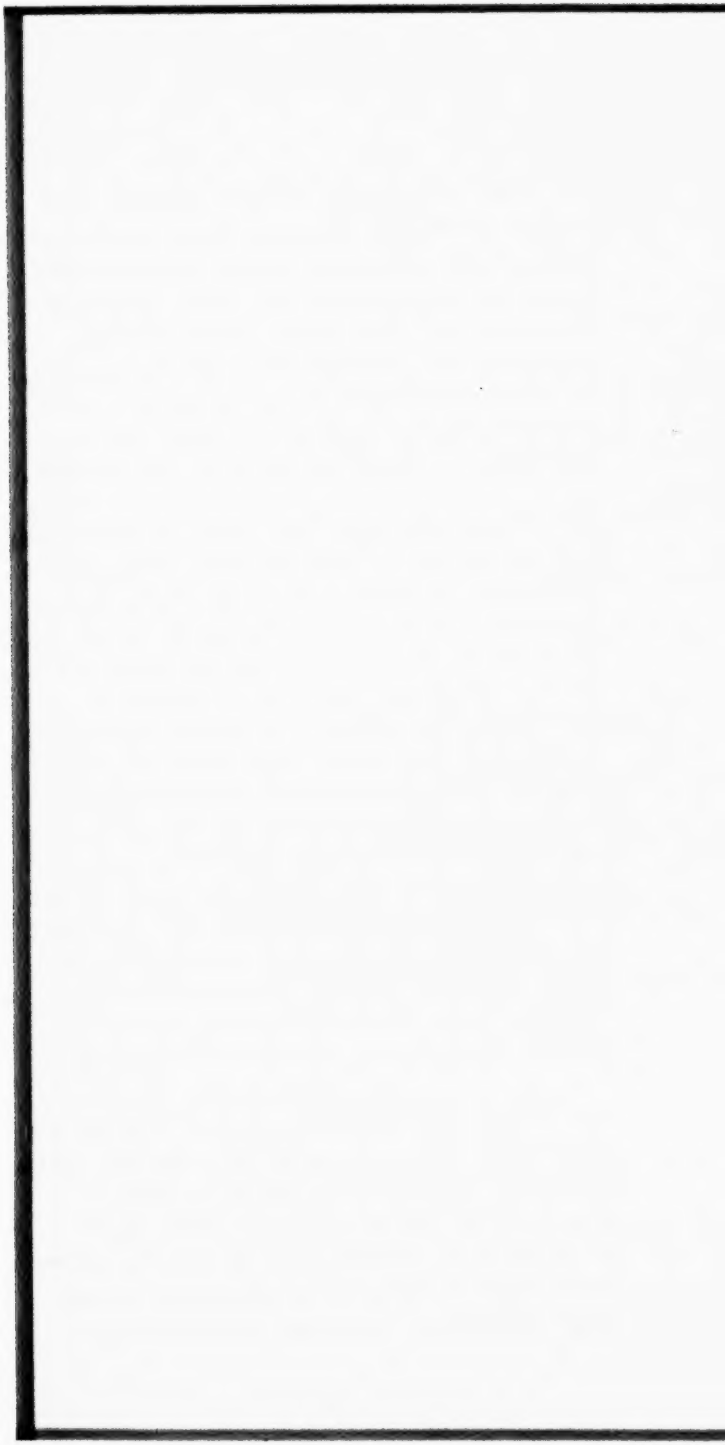
At the hearing held on August 22, 1973 the witness submitted five arguments in opposition to the Government's petition for immunity:



1) that District Court Judge Louis Bechtle should have disqualified himself from consideration of the immunity application becuase of the fact that,while serving as United States Attorney, he had presided over several investigations and at least one indictment directed at PHILIP TESTA,

2) that the United States Attorney deliberately lied to the witness' counsel by assuring him that no immunity petition would be submitted to the court on August 22, 1973, causing the Petitioner's attorney to schedule other proceedings for that day and to refrain from preparing adequately researched arguments as to the impropriety of the application, thus denying the witness his right to effective assistance of counsel as guaranteed in the Sixth Amendment of the United States Constitution and violating the witness Fifth Amendment Due Process right.

3) that the subpoena and immunity petition served upon MR. TESTA were fatally defective because the questions which the Government intended to pose at the Grand Jury were based upon information gathered through illegal electronic



surveillance of the Petitioner,

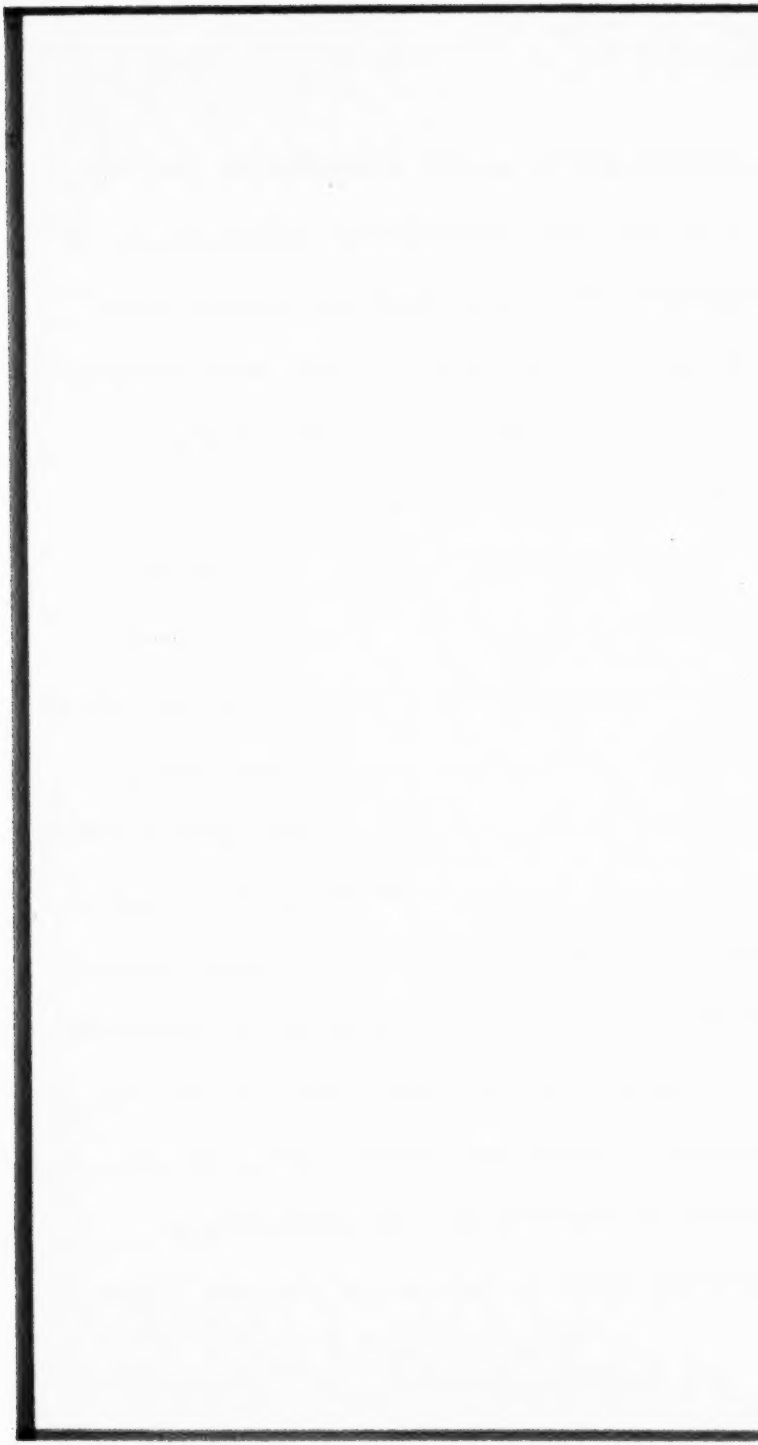
4) that granting immunity to the Petitioner would subject him to contempt proceedings for continued refusal to testify and to the risk of being imprisoned for contempt a second time within five years in contravention of the Fifth Amendment prohibition on Double Jeopardy,

5) that the immunity petition did not conform to the statutory requirements since the Authorization by Assistant Attorney General Henry E. Petersen was signed fully four months before the Grand Jury in front of which TESTA was summoned had convened.

The court rejected the witness' effective assistance of counsel claim and request for judicial disqualification by reasoning that grant of the immunity petition was mandatory once the statutorily-required documents had been submitted, and, consequently, Judge Bechtle concluded, neither the possibility of the judge's being

prejudiced by prior exposure to the witness nor the ineffective preparation of counsel resulting from deliberate lies by the U.S. Attorney, could have substantially affected the outcome of the immunity petition hearing.

Petitioner's third and fourth arguments against the immunity raised the claims that the subpoena for MR. TESTA and all consequent proceedings were tainted by illegal electronic surveillance and by the Fifth Amendment prohibition on being punished twice for the same crime. Both contentions, Judge Bechtle reasoned, were properly cognizable only after the immunity grant and after continued refusal to testify at an evidentiary hearing held to determine whether "just



cause" (see 28 U.S.C.A. §1826) for the witness' silence existed such as to preclude a finding of contempt.

Judge Bechtle made no remarks to explain his rejection of Petitioner's claim that the Assistant Attorney General's authorization for an immunity application predated the existence of the Grand Jury before which TESTA eventually appeared.

When Judge John Morgan Davis ordered the Petitioner imprisoned on September 12, 1973, his comments dealt with but one of the many issues raised during the four-day hearing on the Government's contempt petition. He found as a matter of fact that the Government had proven the existense of some basis

for the questions directed at MR. TESTA, other than the transcripts resulting from illegal electronic surveillance of the Petitioner. Nowhere among his remarks, however, did he designate the specific investigative method by which federal agents independently arrived at the same information regarding MR. TESTA as that which they had already amassed as a result of illegal bugs and wiretaps.

Notice of Appeal from the Order of Judge Davis was filed on September 12, 1973. Notwithstanding the explicit mandate of 28 U.S.C.A. § 1826 that appeals from orders of committment for contempt "shall" be decided within thirty days, it was only after the passage of thirty-eight days and after a motion for release of the Petitioner

that the Circuit Court of Appeals, by order dated October 25, 1973, affirmed Judge Davis.

Initailly, Circuit Judge Hunter's opinion addressed itself to the question of whether Judge Bechtle improperly refused to disqualify himself from presiding at the hearing held on the Government's petition for immunity. Citing the standard for disqualification set forth in 28 U.S.C.A. § 455, the opinion reasoned that Judge Bechtle, as former United States Attorney, had not participated in the identical case as that which was before him and did not have a sufficient "substantial interest" in the outcome of the proceeding so as to require his assigning the case to another judge. Even if the Judge's connection with TESTA'S case had

been sufficient to meet § 455's standard for manditory disqualification, the opinion added, the alleged absence of discretion in the presiding judge to deny a properly documented immunity application would prevent prejudice arising from the error.

Reviewing the question of whether the subpoena and questioning of Petitioner were tainted by illegal electronic surveillance, the Circuit Court concluded that the Government had established, by a preponderance, an independent basis for questioning TESTA. Petitioner had argued that each so-called "independent" investigative technique, linking the witness to organized crime failed, upon cross-examination of the United States Attorney, to yield facts incriminating as to the

the witness. The Circuit Court dismissed that contention as merely raising the remote possibility of a connection between the illegal surveillance and the Government's decision to interrogate the Petitioner as to matters involving syndicated corruption.

Finally, Judge Hunter's opinion iterated Petitioner's contentions that the proceedings were fatally defective because (1) TESTA was subpoenaed only for the purpose of harrassing him, since repeated criminal prosecutions directed against him had resulted in not guilty verdicts, (2) incercerating the witness a second time for failing to testify regarding "organized crime" violated the double jeopardy ban, and (3) the Court improperly refused to exercise its discretion under

28 U.S.C.A. § 1826 to prescribe an appropriately limited period of imprisonment for less than the full term of the Grand Jury. All three arguments were dismissed out of hand as being completely unmeritorious.

JURISDICTIONAL STATEMENT

PHILIP CHARLES TESTA petitions this court for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The Writ is sought for review of the Circuit Court's judgment of October 25, 1973, affirming the District Court's September 12, 1973 decision holding the Petitioner in contempt and ordering him confined in the Federal Detention Center until such time as he purge himself of contempt or until the expiration of the Grand Jury before which he refused to testify.

The Supreme Court's appellate jurisdiction is provided for under the terms of 28 U.S.C.A. § 1254 which provides

in pertinent part:

> § 1254. Courts of appeals; certiorari; appeal; certified questions
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By wirt of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Moreover, the statutory period for timely filing of the certiorari petition is defined in § 2101 (c) of Title 28, U.S.C.A. which reads:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

and thus designates the nintieth day

following judgment in the Circuit Court of Appeals as the applicable limit on filing a certiorari petition in the instant case.

STATEMENT OF QUESTIONS PRESENTED

Whether failure of the Third Circuit Court of Appeals to dispose of Petitioner's case within the 30-day period explicitly mandated by 28 U.S.C.A. § 1826 (b) should have resulted in the immediate release of PHILIP CHARLES TESTA on September 14, 1973, the thirty-first day after filing of the Notice of Appeal?

Did the district court improperly immunize the Petitioner, since the Government's request for immunity failed, on its face, to conform to the statutory requirements for granting immunity?

Was the incarceration of the Petitioner violative of the Fifth Amendment's Double Jeopardy prohibition and the Eighth Amendment's cruel and unusual punishment clause, since it resulted from successive attempts to secure imprisonment of PHILIP CHARLES TESTA by immunizing him (one of which attempts succeeded in causing him to be imprisoned a year for contempt) and successive criminal prosecutions resulting each time in not guilty verdicts?

Was the imprisonment of PHILIP CHARLES TESTA ordered in contravention of the Due Process Clause of the Fifth Amendment and federal evidentiary rules and decisions, because the government failed to prove that the questions asked the Petitioner originated

independently of the illegal electronic surveillance to which he was subjected?

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS PETITION

The procedure for securing a witness' immunity appears at 18 U.S.C.A. § 6001-6003:

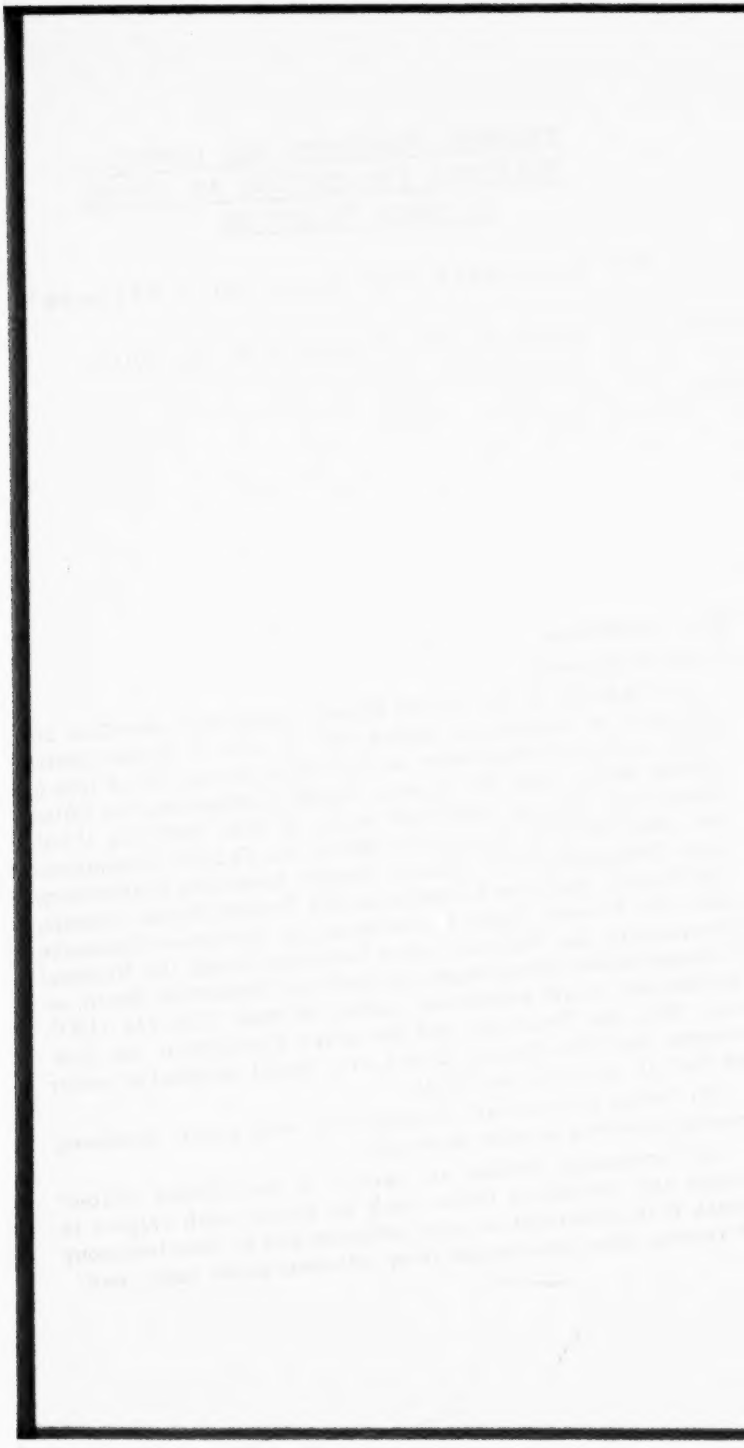
§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and



(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Repeated references in this Petition are made to in 28 U.S.C.A. § 1826, which provides for civil confinement of immunized witnesses who persist in refusing to testify:

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

18 U.S.C.A. § 2515 is cited herein as statutory authority for the witness' objections to questions put to him as being derived from illegal electronic surveillance:

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

In response to the witness' claim of illegal bugging, the Government must, by Affidavit, affirm or deny the alleged misconduct, and 18 U.S.C.A. § 3504, the statute requiring governmental response, is set out as follows:

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

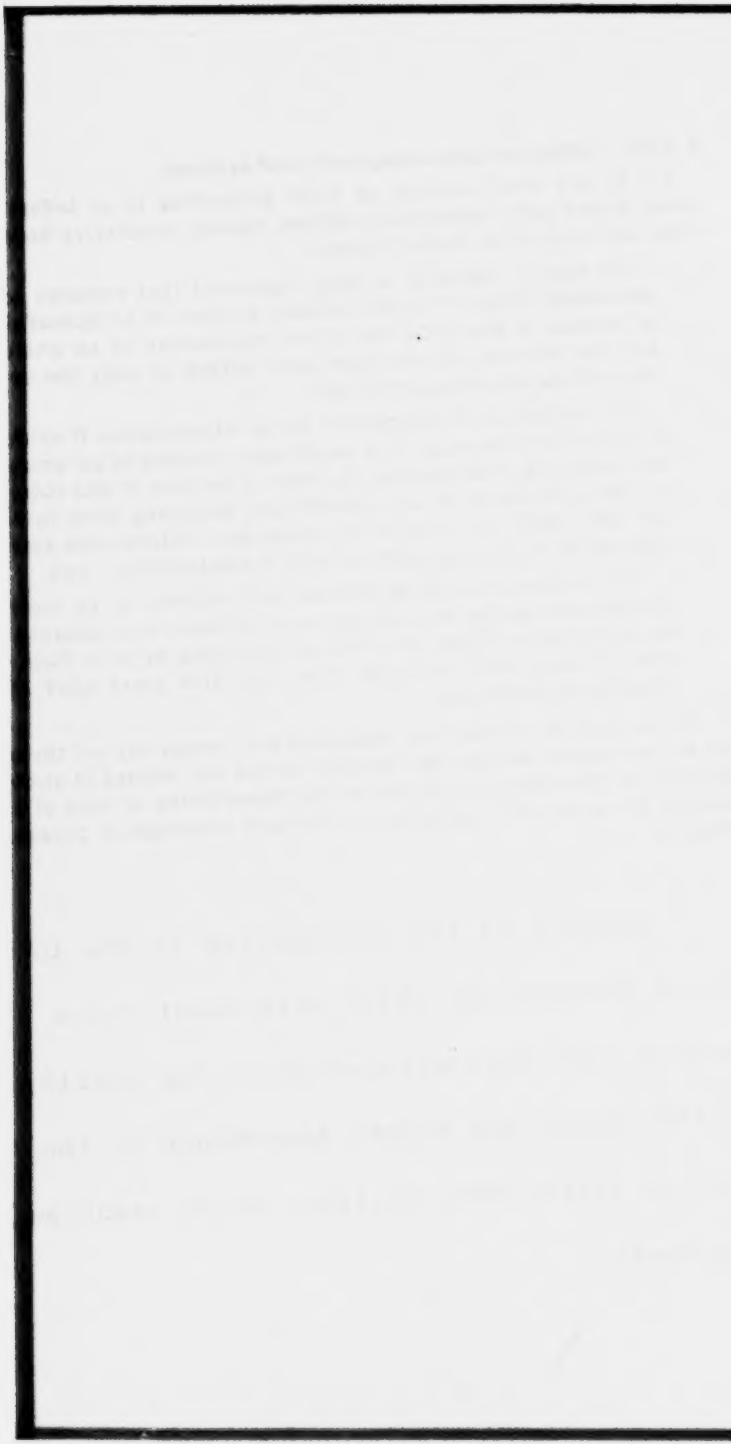
(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

Several of the infirmities in the lower Court proceedings which Petitioner cites herein rest upon references to the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, which reads as follows:

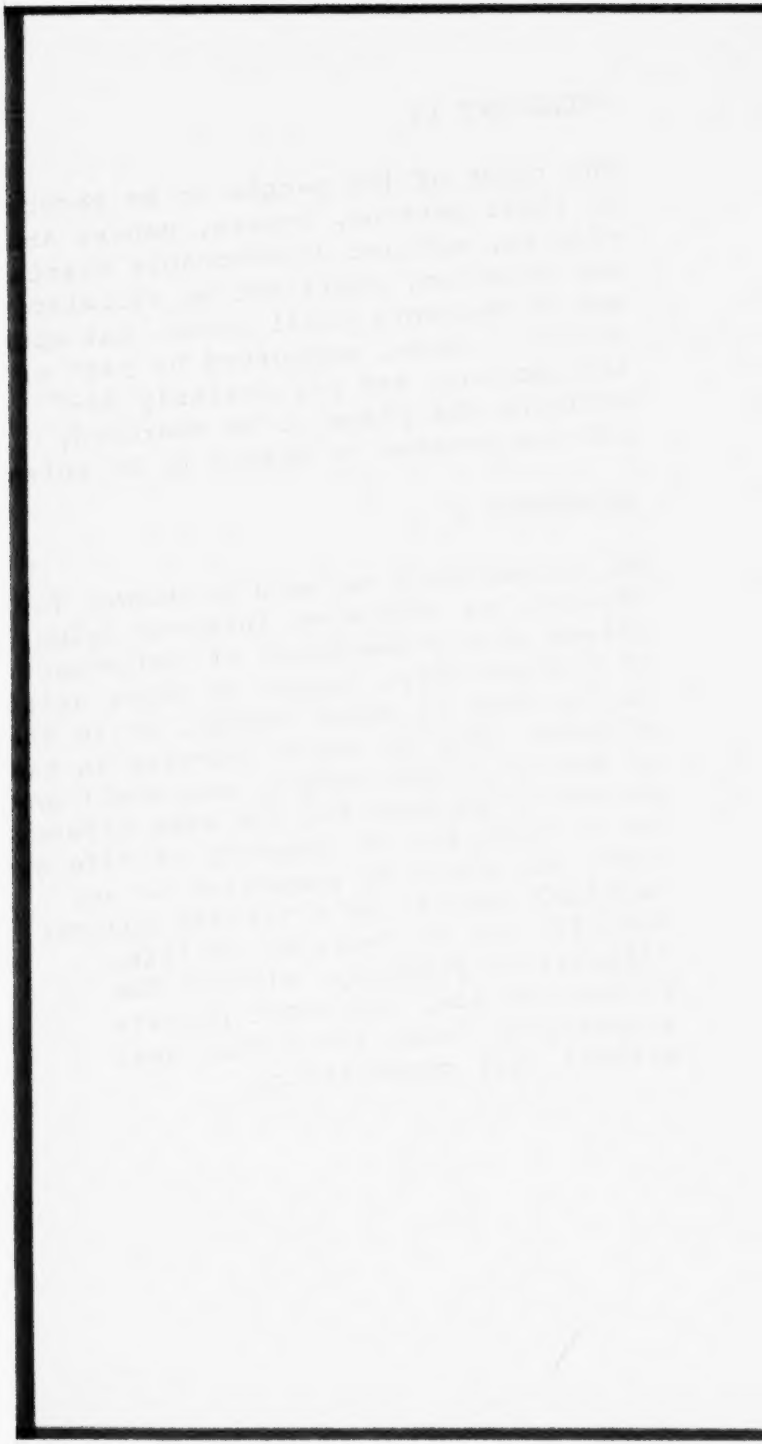


AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

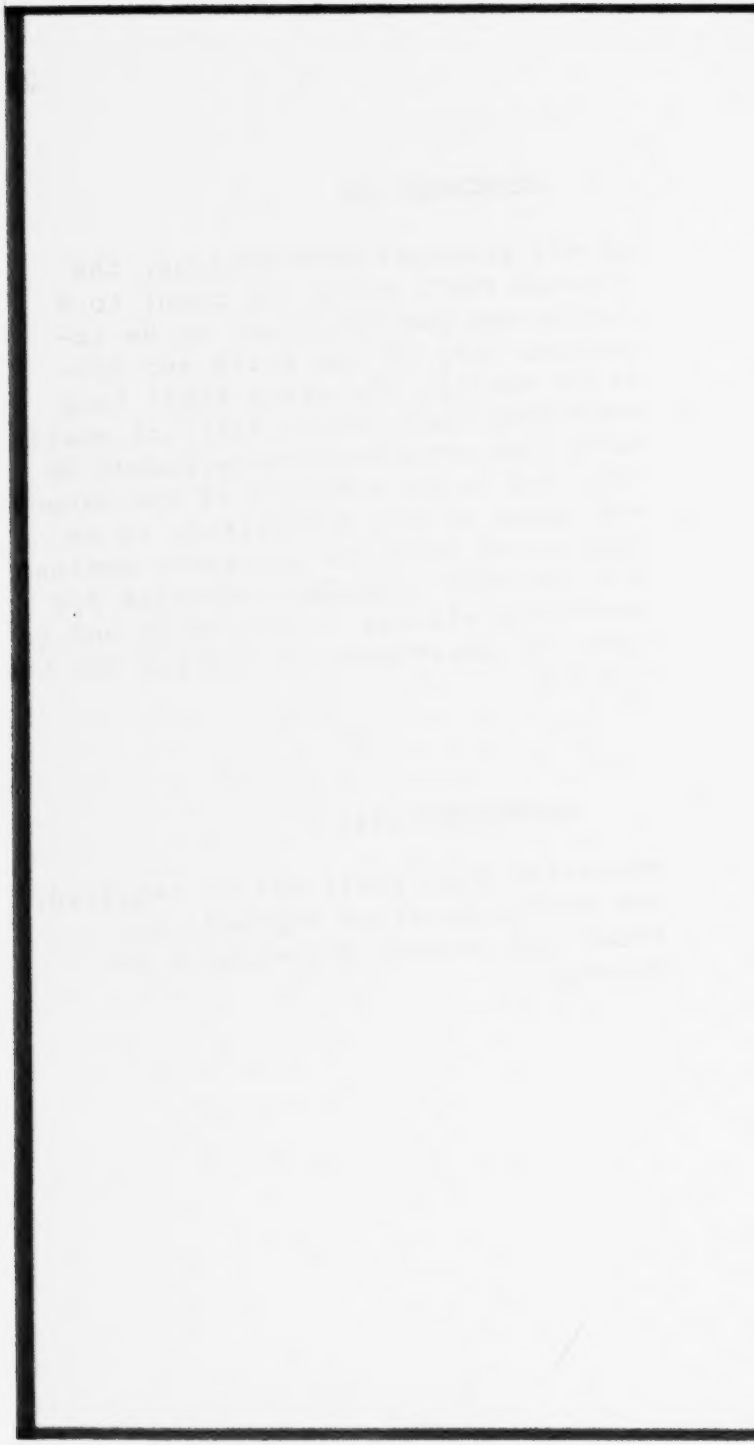


AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in has favor and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



PENNSYLVANIA STATUTES

Reference will be made to the Pennsylvania Criminal Statutes prohibiting the same electronic surveillance which is legal under Federal law (18 U.S.C.A. § 2510 et. seq.). The relevant provisions appear at 18 Purdons §5701, 5702, which are the same as 18 Purdons §3741 and 3742, the statutes outlawing electronic surveillance since 1957:

§ 5701. Definitions

Subject to additional definitions contained in subsequent provisions of this chapter, the following words and phrases, when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Divulge." Includes divulgence to a fellow employe or official in government or private enterprise or in a judicial, administrative, legislative, or other proceeding.

"Person." Includes persons acting or purporting to act for, or in behalf of, any government or subdivision thereof, whether Federal, State, or local.

"Private place." A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but the term does not include a place to which the public or a substantial group thereof has access.

§ 5702. Breach of privacy of telephone or telegraph communications

A person commits a misdemeanor of the second degree if he:

(1) intercepts without permission of the parties to the communication a message or other communication by telephone or telegraph;

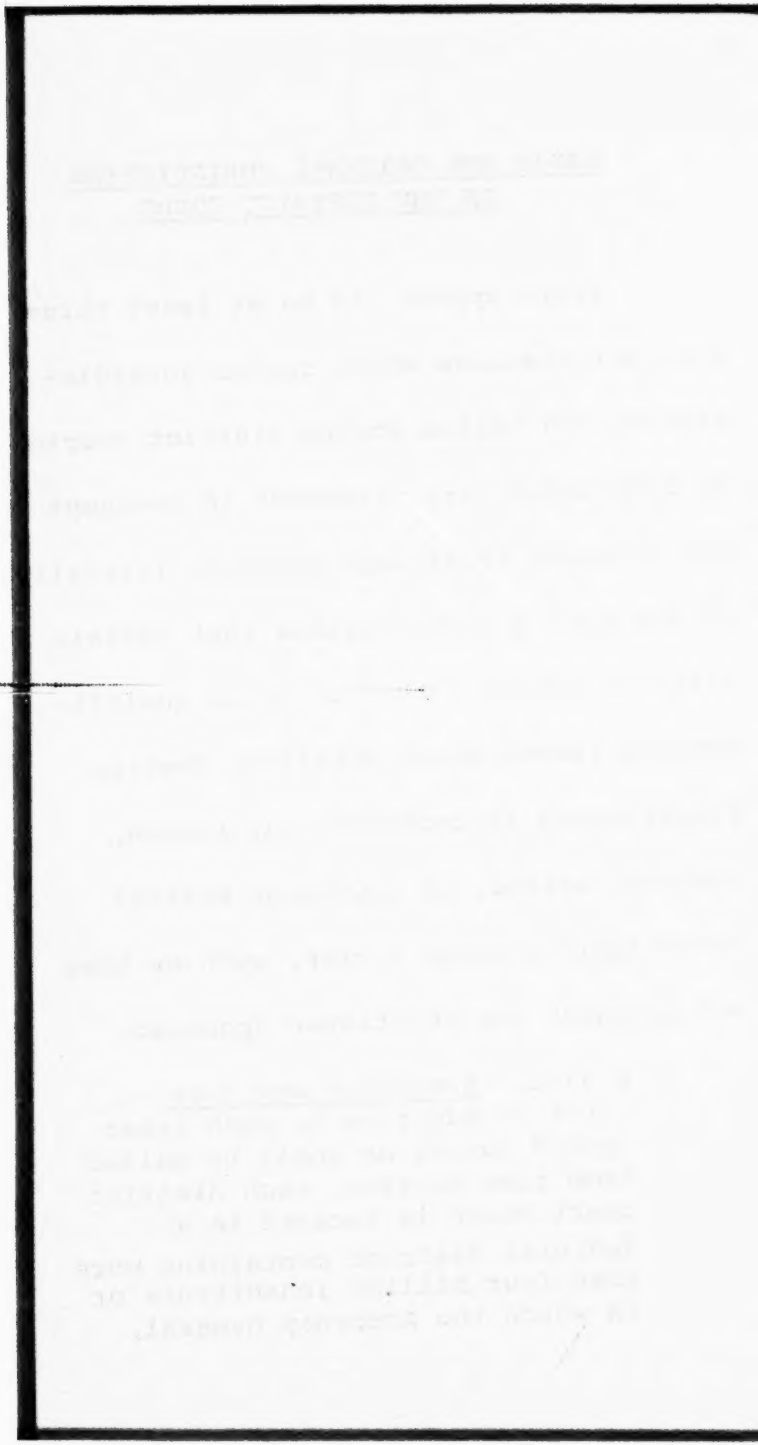
(2) installs or employs any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this chapter; or

(3) divulges or uses without the consent of the sender or receiver the existence or contents of any such message or other communication if the actor knows that the message was illegally intercepted, or if he learned of the message in the course of employment with an agency engaged in transmitting it.

BASIS FOR ORIGINAL JURISDICTION IN THE DISTRICT COURT

There appear to be at least three distinct statutes which confer jurisdiction on the United States district courts to find Grand Jury witnesses in contempt and to order their imprisonment. Initially, 18 U.S.C.A. § 3331 provides that certain district courts with designated qualifications (among which districts Eastern Pennsylvania is included) may summon, convene, extend, or discharge special investigative grand juries, such as that before which the Petitioner appeared:

> § 3331. Summoning and term
> (a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General,



> the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district, shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of § 3333 of this chapter.

Thus, § 3331, designates district court jurisdiction to <u>preside over</u> special investigative grand juries.

Section 6002 and 6003 further extend jurisdiction by permitting district court review and approval of properly submitted Government petitions to grant to a witness immunity from prosecution based upon inculpatory admissions contained in the witness' testimony:

> § 6002. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the Unites States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to

comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury Proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a)of this section when in his judgment -
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Thus, sections 6002 and 6003, in essence, supplement district court jurisdiction to preside over the grand jury as prescribed by 18 U.S.C.A. § 3331, with a grant to the district court of jurisdiction to preside over the conduct of the individual grand jury witnesses.

Finally, the terms of 28 U.S.C.A. § 1826 provide the district court with jurisdiction to prescribe imprisonment as a civil remedy to coerce witnesses into obedience of certain orders, issued pursuant to the court's jurisdiction to preside over the conduct of the jury and the witnesses, directing the witness to testify:

> § 1826. Recalcitrant witnesses
>
> (a) Whenever a witness in any proceeding before or ancillary to any court of grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to it's attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such con-

finement shall exceed the life of—

(1) the court proceeding, or,

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a)of this section shall be admitted to bail pending the determination of an appeal taken by him from an order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT OF THE CASE

PHILIP CHARLES TESTA, the Petitioner herein, has been incarcerated in the Philadelphia Detention Center since September 12, 1973, pursuant to an Order of the United States District Court for the Eastern District of Pennsylvania, holding him in contempt for refusing to answer questions posed by the Federal Grand Jury. This Petition is for a Writ of Certiorari to the Court of Appeals for the Third Circuit which upheld the contempt Order on October 25, 1973.

The history of this proceeding begins in March of 1973, when a decision was reached in the Philadelphia office of the Justice Department's Organized Crime Strike Force to subpoena the Petitioner for testimony before a Federal Grand Jury investigating organized crime. Although the Grand Jury before which Mr. TESTA eventually appeared was not convened until July of 1973, and although Mr. TESTA was not subpoened to testify until August 12, 1973, the United States Attorney sought and obtained authorization to grant him immunity on March 22, 1973.

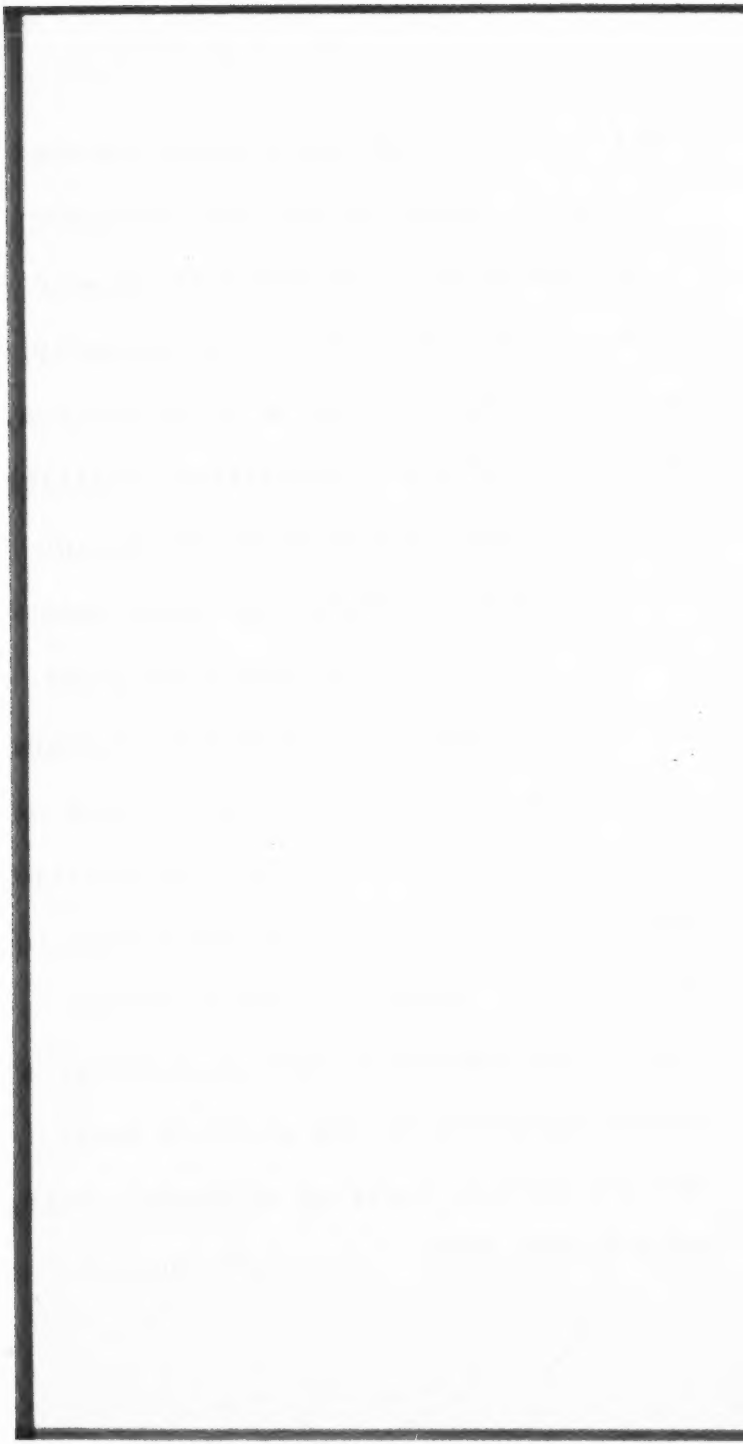
On the morning of August 12, 1973, sometime before dawn, F.B.I. agents surrounded Mr. TESTA'S home in South Philadelphia and, although they had no warrant, they announced their presence with shouting and pounding on doors and windows. One agent pushed a subpoena through a mail slot in the front door of the home and announced to those inside that Mr. TESTA had been served. Prior to the date upon which the Petitioner was to appear before the Grand Jury, August 22, 1973, his counsel contacted the Assistant United States Attorney in order to discuss the proceedings contemplated for that day. The Petitioner's attorney informed the prosecutor that Petitioner intended to assert his Fifth

Amendment right to refuse to answer questions posed by the Grand Jury. In addition, counsel notified the Government that he had several other proceedings scheduled for that morning and he wished to know wither the United States intended to seek immunity for the witness so that he might gather authorities in support of his objection to the grant of immunity, as well as cancel conflicting proceedings, in order to provide sufficient time for presenting his argument against granting an Order of Immunity. The Assistant United States Attorney assured the witness' counsel that if Mr. TESTA refused to answer questions on the basis of the Fifth Amendment it would take several weeks, or even months, to secure authorization

from Washington to petition for immunity. Since the authorization for an immunity Petition had been signed by Assistant Attorney General Henry Peterson, the statement made by the local Strike Force Attorney was a deliberate lie. Nevertheless, the United States Attorney asserted to Petitioner's counsel that no authorization for an immumity Petition had been secured and suggested that gathering authorities to support a formal argument against such a Petition would, therefore, be unnecessary at that time.

On August 22, 1973, the witness appeared before the Federal Grand Jury and refused to answer approximately two dozen questions posed to him. The Govern-

ment then directed the witness and his counsel to appear before the emergency judge immediately, in order to respond to a Petition for Granting of Immunity, subject to the provisions of 18 U.S.C.A. §6002. Immediately thereafter, Petitioner and his counsel appeared at the designated courtroom, where they found themselves in front of the emergency judge assigned to handle extraordinary matters in the District Court during the week of August 20, 1973. Initially, the Petitioner requested a continuance in opposition to the grant of immunity. The presiding judge, the Honorable Louis C. Bechtle, a recent appointee to the District Court for the Eastern District of Pennsylvania, had overseen many fruitless investi-



gations directed at Mr. TESTA, as well as one indictment and prosecution resulting in a not-guilty verdict for Mr. TESTA. Judge Bechtle denied the witness' request for a continuance and directed counsel to set forth arguments in opposition to the Petition for Immunity. Petitioner asserted three main points against the Government's request:

1) the fact that the presiding Judge had been personally involved in the investigation and prosecution of the witness during his tenure as United States Attorney;

2) the fact that questions posed to Mr. TESTA were based upon illegal electronic surveillance;

3) the fact that Petitioner's attorney was unable to fully prepare arguments in opposition to the Petition for Immunity as a result of deliberate deception by the Government and that lack of preparation

denied the witness' Sixth Amendment right to the effective assistance of counsel.

Rejecting these three arguments, Judge Bechtle ordered the Petitioner to return immediately to the Grand Jury room and answer questions posed to him. During the afternoon session on August 22, 1973, the Assistant United States Attorney posed the same questions to the witness as he had earlier that day and the witness respectfully refused to answer those questions while asserting his right to remain silent, based upon his rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution. At that time the witness was excused. On August 24, 1973, the

Government filed a Petition and Rule directing the witness to show cause why he should not be held in contempt pursuant to 28 U.S.C.A. §1826 because of his refusal to answer questions posed by the Grand Jury. On the same day, counsel for the witness filed an Answer to the contempt Petition, asserting the same three arguments in opposition to a contempt citation as had been asserted against the Government's Petition for Immunity (supra), as well as the additional contention that the Petition for Immunity was improperly authorized since it had been secured before the existence of the Grand Jury, before the Government could possibly have known whether Mr. TESTA would have material information

to convey to the Grand Jurors, and before either the witness or anyone else could ascertain whether he would answer questions posed to him. By Order of August 24, 1973, Judge Bechtle scheduled a hearing on the contempt Petition for September 5, 1973. Subsequently, Judge Bechtle's Order of August 29, 1973 transferred the entire proceeding to the Honorable John Morgan Davis.

Prior to the September 5, 1973 hearing, Steven Stein, the Special Attorney for the Philadelphia Organized Crime Strike Force, filed with the Court an Affidavit in which he summarized all electronic surveillance of either the witness or the witness' attorneys known

to him at that time. The Affidavit revealed that all of the witness' attorneys were subject to electronic surveillance at one time or another, that at least one of those attorneys had been monitered by means of illegal electronic interception, and that on prior occassions the witness had been the victim of extensive illegal, as well as legal bugging. The hearing on the contempt citation was conducted on September 5, 10, 11, and 12, 1973. The principal witness for the United States was Steven Stein, Special Attorney for the Strike Force, who testified as to the sources of information which formed the basis for the Government's decision to subpoena Mr. TESTA to give information

regarding organized crime. Although Stein could designate no investigative resources except illegal electronic surveillance as the origin of information connecting the witness to organized crime, Judge Davis found that the Government's burden to prove that the questions posed to the witness were untainted by illegally seized evidence had been met. On September 12, 1973, the Court adjudged PHILIP CHARLES TESTA to be in contempt, ordered him confined at the Federal Detention Center, and denied his Application for Bail pending Appeal.

On September 13, 1973, counsel for the witness filed in the Court of Appeals for the Third Circuit a Notice

of Appeal, as well as a Motion to release the witness on Bail pending disposition of the Appeal. The Bail Motion was denied on September 14, 1973, and, notwithstanding the mandate of 28 U.S.C.A. §1826, that all Appeals be disposed of within thirty (30) days, this witness' appeal remained undecided on October 23, 1973, when his counsel filed a Motion for Release because of Failure to Meet the thirty (30) day Requirement. On October 25, 1973, the Circuit Court of Appeals without deciding the witness' Motion for Release, issued an Order with opinion by Judge Hunter affirming the District Court holding of contempt. The witness' Petition for Writ of Certiorari seeks review of that Order

and Opinion.

ARGUMENT

I. FAILURE OF THE THIRD CIRCUIT COURT OF APPEALS TO DISPOSE OF PETITIONER'S CASE WITHIN THE THIRTY-DAY PERIOD EXPLICITLY MANDATED BY 28 U.S.C.A. §1826(b) SHOULD HAVE RESULTED IN THE IMMEDIATE RELEASE OF PHILIP CHARLES TESTA ON OCTOBER 14, 1973.

On September 12, 1973, District Court Judge John Morgan Davis ordered the Petitioner imprisoned until he purged himself of contempt by answering the questions posed to him by the special federal grand jury. But a single day passed before MR. TESTA'S counsel filed notice in the District Court Clerk's office of the Petitioner's intention to seek review of the contempt order in the Third Circuit Court of Appeals. With equal dispatch, the Third Circuit, per Judge Bigg's order

of September 14, 1973, ordered the District Court record to be filed that same day, briefs from both parties to be submitted by September 19, reply briefs to be delivered by September 24, and the matter to be listed "for disposition on the merits at the earliest convenience of the Court" (emphasis supplied).

The same statute authorizing imprisonment for contempt, 28 U.S.C.A., Section 1826, mandates that: "Any appeal from an order of confinement... shall be disposed of...not later than thirty days from the filing of such appeal (emphasis added)." Notwithstanding Judge Biggs' instructing the Circuit Court Clerk to schedule this matter for

immediate hearing, no action had been taken to review Philip Charles Testa's claim of illegal confinement by October 14, 1973, the thirty-first day after the date on which notice of appeal was filed in the District Court. Petitioner's research reveals no other instance since enactment of §1826 where a Circuit Court failed to decide an appeal from a contempt order within the requisite thirty days.

There are at least three substantial arguments supporting the petitioner's contention that the Circuit Court's tardiness warranted vacation of the subpoena, immunity decree, and contempt order on the morning of October 14, 1973. First,

the legislative history of §1826 (P L. 91 452, Title III, §301) indicates Congress' intention in creating the thirty-day requirement was to prevent inequity to those recalcitrant witnesses whose proper claim of "just cause" for refusing to testify would subject them to the risk of lengthy confinement prior to eventual vindication in the Court of Appeals. Senate Report Number 91-617 accompanied the earliest version of S. 30, the "1970 Organized Crime Control Act." The original bill with which report number 617 was concerned contained no time limit within which appeals were required to be decided. In correspondence addressed to the Senate Judiciary

Committee (reproduced at pages 108-9 of the report) this omission was criticized by the United States Department of Justice. The Attorney General's Office suggested that §1826 would likely engender appeals challenging imprisonment with assertions of the unconstitutionality of the use immunity statute, the violation of the Fifth and Sixth Amendments guarantees of due process, jury trial, and assistance of counsel resulting when the subpoena, request for immunity, and contempt order were secured by a prosecutor whose goal was to imprison the witness rather than to gather information, and other close constitutional questions which the

draftsmen of the Act knew they had left unresolved. Designating these substantial controversies as "valid" bases for appeal, the Justice Department suggested the thirty-day limit so that appellants advancing significant constitutional justification for remaining mute need not suffer indefinite jail terms as a penalty for asserting their rights. Commenting on the inclusion of the thirty-day time limit for appeals in the Crime Control Act, House Report No. 91-1549 left no doubt that that section's provision was to be strictly construed: "Disposition of the appeal is mandated as soon as practicable, but not more than thirty days from the filing."

See 1970 U.S Code Cong. and Admin. News Page 4022. The express terms of §1826, along with the cited passages from congressional reports, permit but one interpretation of that section's applicability to the facts at issue in this matter: when the thirty-day period runs, disposition of the appeal occurs automatically without regard to any further deliberation by the Court of Appeals and, if the terms of that disposition are to conform to the legislative objective of protecting the witness from excessive imprisonment without just cause, then necessarily, on the thirty-first day following notice of appeal, the Court of Appeals Clerk should routinely file an Order vacating the subpoena and the

immunity and contempt orders.

The second argument which the Petitioner believes requires vacation of the contempt order after thirty days, is based upon Court of Appeals decisions construing §1826 (b)'s thirty-day period as an absolute strict limit on the time for disposition of an appeal in the Circuit Court. Reed -v- United States (9 Cir., 1971) 448 F.2d 1276 and Charleston -v- United States (9 Cir., 1971) 444 F.2d 504, cert. denied 404 U.S. 916, 92 S.Ct. 241 deal with precisely analagous factual situations. In both cases, the witnesses were found to be in contempt, though the order for imprisonment was stayed in each matter.

Each witness asserted a constitutional infirmity in the proceedings as supplying just cause for his recalcitrance. Reed claimed that the interrogation to which he was subjected was defective since it resulted from electronic surveillance not authorized in the manner prescribed by Title III; similarly, Charleston argued that the immunity given him under 18 U.S.C.A. §6001—6003 was not coextensive with the Fifth Amendment bar on compulsory self-incrimination and, thus, insufficient to overcome the traditional right to remain silent. Both claims had been rejected by prior Court of Appeals decisions, Reed's in United States -v-

Gelbard (9 Cir., 1971) 443 F.2d 837, and Charleston's in United States -v- Kastigar (9 Cir., 1971) F.2d ; and both of those decisions were declared to be improper by the witnesses, who sought to have them overturned by the Appeals Courts, notwithstanding the fact that both decisions were before the Supreme Court awaiting review. The Reed and Charleston Courts declared that prior decisions in their Circuit could only be overturned by the ruling of an Appeals Court sitting en banc, that scheduling argument and deliberation before the Court en banc could not be accomplished within thirty days, and that the thirty-day requirement of 28 U.S.C.A. §1826(b) was intended

to be applied inflexibly. Consequently, the thirty-day requirement was held to deny the witnesses' right to en banc review and to compel disposition of the cases in conformity with the prior Circuit Court decisions - i.e. - affirmance of the contempt orders.

Analysis of the Reed and Charleston holdings gives strong support to Petitioner Testa's argument for vacating the contempt order under which he is imprisoned. Consider that the insistence of the Appeals Courts upon adhering strictly to the thirty-day requirement logically manifests those Courts' understanding that tardy disposition of the appeals triggers a sanction in the form of an automatic

disposition of the matter on appeal. Logic dictates that the disposition which those Courts anticipated on the thirty-first day was not an automatic affirmance of the District Court's contempt order. Such a practice would surely contravene §1826(b)'s policy of protecting the witness. Furthermore, anticipation of an automatic affirmance would dictate a result contrary to the Reed and Charleston ruling; if affirmance of the contempt order was the inevitable consequence of failure to make timely disposition of the appeal, then the Circuit Courts would certainly have attempted to schedule an en banc review in these two cases, since failure to complete

the appeal process in time would have resulted in the same affirmance which they decided upon in the opinions as reported. Nor could the Reed-Charleston Courts have envisioned the consequence of their untimely decision to be immediate release of the prisoner until judgment and opinion on appeal were forthcoming; in both cases, operation of the contempt orders was stayed, the witnesses were free, and yet, the Circuit Courts insisted on precise adherence to the provisions of §1826(b). Clearly then, the decisions in Reed and Charleston can only be interpreted as recognizing violation of the thirty-day requirement as a fatal defect in the contempt order

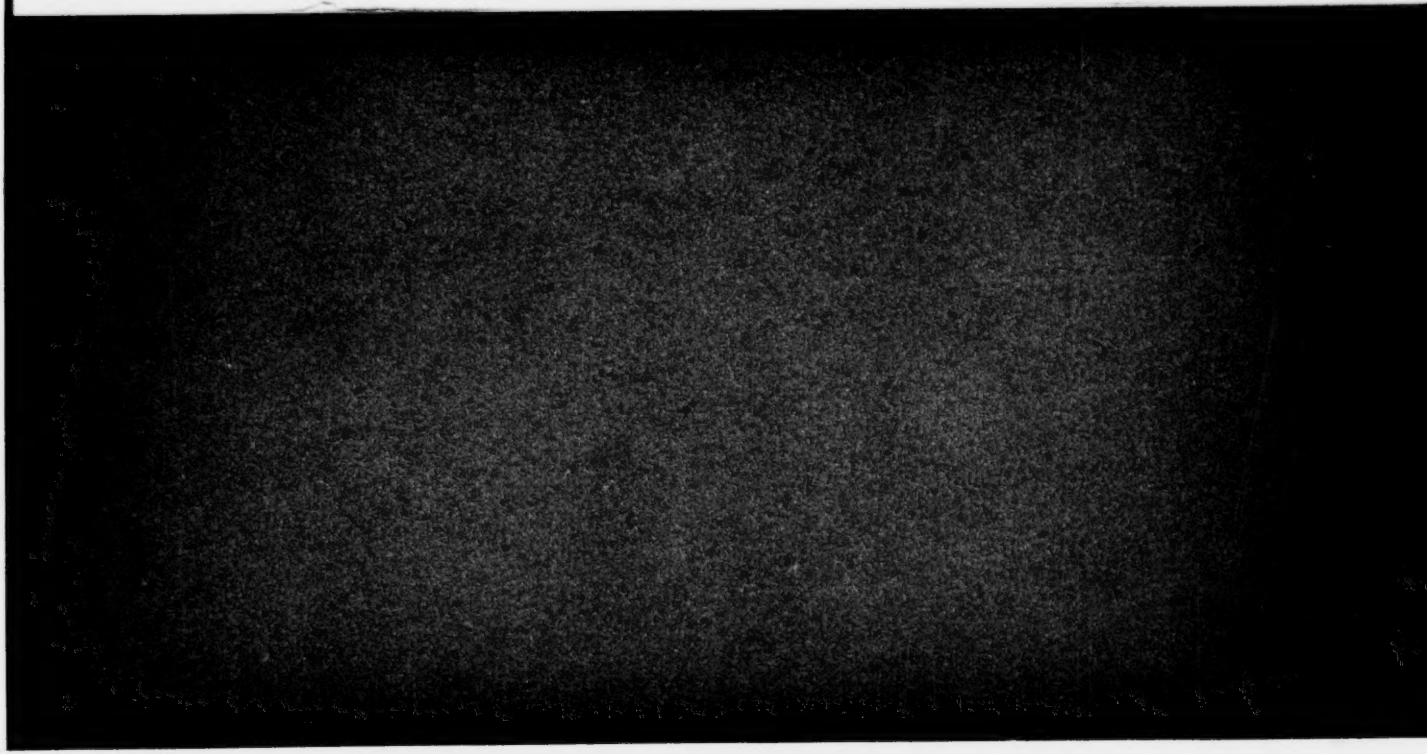
effectively vitiating each step of the proceeding from subpoena to order for imprisonment.

The third argument in support of Petitioner's assertion that the Third Circuit Court of Appeals should have vacated the contempt order on October 14, 1973, is that the §1826 requirement that appeals "shall" be disposed of within thirty days is utterly meaningless and ineffective if not construed to require immediate vacation of the contempt order when the thirty days for appeal run. The Petitioner respectfully submits that the failure of the Third Circuit Court of Appeals to give any effect to §1826's time limit coupled with the absence in the Ninth Circuit cases of a clear un-

equivocal definition of the consequence of untimely disposition of the appeal creates a compelling need for this court's grant of a certiorari writ. Unless this Court supplies a resolution of the divergent circuit court interpretations of § 1826, the requirement that appeals be disposed of within thirty days,touted by Congress as a safeguard for the witness, will come to be regarded as mere surplusage within the framework of the contempt statutes.

The practical consequences of failure to grant the Writ of Certiorari are more compelling than the legal consequences which would result from this Court's avoiding an opportunity to effectuate the thirty-day time limit as the Congress had intended. Allowing the third circuit to dispose of

this appeal within thirty-eight days necessarily sanctions much longer delays in the disposition of future appeals. Relaxation of the express requirement of 1826(b) even to permit the appellate court's decision a few minutes out of time must inevitably result in appeals' being decided months after filing; the witness' only hope for limiting the period of confinement pending appeal will be to attempt the difficult task of demonstrating actual prejudice. Writ of Certiorari, in this case, will necessarily save hundreds of prisoners from countless hours of imprisonment served pending the disposition of appeals which, in many cases, will result in rulings justifying the witness recalcitrance.



FILED
JAN 28 1974
MICHAEL RODAK, JR., CLE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973 NO. 73-1146

IN RE: GRAND JURY INVESTIGATION
PHILIP CHARLES TESTA,
Witness

PHILIP CHARLES TESTA,
Appellant

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT F. SIMONE, Esq.
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VOLMUE II of II

II. DISTRICT COURT JUDGE BECHTLE IMPROPERLY IMMUNIZED THE PETITIONER BY CONCIOUSLY DISREGARDING THE GOVERNMENT'S FAILURE, APPARENT ON THE FACE OF THE IMMUNITY PETITION, TO DEMONSTRATE THE PARTICULAR CIRCUMSTANCES REQUISITE FOR A GRANT OF IMMUNITY.

A. DISTRICT JUDGE LOUIS C. BECHTLE ERRED IN RULING THAT NO OBJECTION COULD BE RAISED TO THE GOVERNMENT'S IMMUNITY PETITION.

Judge Bechtle considered the Government's Petition to Immunize PHILIP CHARLES TESTA at the August 22, 1973 hearing. He ruled then that a district court judge is compelled to approve the Government's immunity petition whenever the documents required by 18 U.S.C.A. § 6003 have been submitted; furthermore, he reasoned that the court was powerless to examine the contents of the supporting documents to determine whether there appeared on the

face of the immunity petition facts sufficient to demonstrate the public interest and likelihood of the witness' refusal to testify requisite under § 6003.

The very existence of § 6003's requirement of judicial review of immunity petitions, should demonstrate the legislative intent that the district court judge is empowered to and expected to review the contents of the Government's application, rather than to confine his attention to merely accepting the petition for filing (a task which could be more efficiently performed by the court clerk). Senate report 91-617 referring at page 32-3 to this immunity provision of the "1970 Organized Crime Control Act" stated: "The granting of immunity in court and legislative proceedings <u>is subject to court</u>

review... [emphasis added]." At page 145 of the same Senate report in the section analysis of 6003's provisions, the judiciary committee stated that it contemplated "no review of prosecutive discretion." Significantly, the later House Report number 91-1549 accompanying the final version of the Act duplicated precisely the extensive section analysis of the immunity provisions which appeared in the Senate Report with the exception of this particular sentence purporting to limit the scope of judicial review - see 1970 U.S. Code Cong. and Admin. News at p. 4018. finally, a recent second circuit court of appeals case, holding that an immunized witness, imprisoned for contempt, may seek release by contesting, at any time,

the continued existence of a necessity for his testimony in the public interest; the district court's right to review the immunity petition after its approval dictates a fortiori, a right to review of the contents of the application before its disposition.

In addition to the provisions for judicial review found in the immunity statute, the right to challenge the use of evidence resulting from unauthorized electronic surveillance is, according to the express terms of 18 U.S.C.A. § 2515 and according to cases construing that section, see, Gelbard v. United States 408 U.S. 41, 92 S. Ct. 2357, 2362 (1972), available to an aggrieved party at any proceeding, including a hearing on the Government's immunity application. Section 2515 would

permit the Petitioner to contend that the Government's assertions of public interest and the likelihood of Testa's refusal to testify, were the fruits of electronic surveillance conducted in violation of Title III of the 1968 Omnibus Crime Control, Safe Streets Act. This application of § 2515 is precisely analagous to the precedure approved in Gelbard whereby a section 2515 claim of illegal bugging was raised by the grand jury witness to demonstrate the illegal origin of the sort of interrogation attempted by the Government.

Denial of the Petitioner's requests for a hearing to review the propriety of the immunity application manifested a failure to properly construe 18 U.S.C.A. § 6003 and a grave departure from the princip for application of 18 U.S.C.A. § 2515,

as explicated in this court's Gelbard decision. In addition to the departure from the sound federal authority inherent in Judge Bechtle's refusal to permit opposition to the immunity application, an equally compelling consideration in support of certiorari review arises from the practical consequences of such a ruling. By refusing to recognize the applicability of § 2515's exclusionary rule to the immunity situation, Bechtle's ruling would compel a witness to defy a command to testify in order to raise the electronic surveillance issue and to suffer months of incarceration in order to appeal an adverse ruling on that issue. That a grand jury witness seeking to vindicate a claim of illegal bugging in a manner approved by our nation's highest Court in Gelbard

must suffer graver sanctions than most felons endure, just to have his claim heard and reviewed is the result of erroneous rulings precluding a full evidentiary hearing on the Government's immunity application. The magnitude of such an inequity argues strongly for this court's intervention.

B. CONCOMMITANT TO THE PETITIONER'S RIGHT TO LITIGATE THE PROPRIETY OF THE IMMUNITY APPLICATION ARE HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL (AS PROVIDED BY THE SIXTH AMENDMENT) IN OPPOSING THE GRANT OF IMMUNITY AND HIS DUE PROCESS RIGHT TO AN ADJUDICATION BEFORE A NEUTRAL AND DETACHED TRIBUNAL, BOTH OF WHICH RIGHTS WERE ABRIDGED IN THE COURSE OF THE AUGUST 22, 1973 HEARING.

On August 22, 1973, the Petitioner appeared before a Special Grand Jury in Philadelphia, Pennsylvania and responded to each question propounded by asserting his Firth Amendment right to remain silent. On the day prior to Petitioner's appearance, counsel for MR. TESTA contacted STEPHEN STEIN, Special Attorney with the Philadelphia Organized Crime

Strike Force and forewarned him of the witness' intention to remain mute. Counsel asked STEIN whether his intention was to petition the Court for immunity immediately upon the Petitioner's refusal to testify. Having secured STEIN'S representation that the Government's immunity Petition would not be submitted for weeks or even months, TESTA'S counsel advised the Strike Force Attorney that, in reliance upon the Government's stated intention to delay filing the immunity petition, counsel intended to schedule other matters for the morning of August 22, 1973, and further intended to forego research and preparation of a formal argument in opposition to the

grant of immunity. The following day, immediately after Petitioner's refusal to testify, STEPHEN STEIN directed MR. TESTA to appear before the Emergency Judge, HONORABLE LOUIS C. BECHTLE, for disposition of the Government's proffered immunity application.

At the hearing before JUDGE BECHTLE, Petitioner's counsel contended that the witness could properly raise objections to immunity, but insisted that two grave defects in the proceedings precluded a fair hearing on the propriety of the immunity application at that time. First, the Petitioner moved the Court to disqualify itself since the Presiding Judge had

served, prior to his judicial appointment, as the United States Attorney and had overseen numerous Grand Jury proceedings and criminal trials involving the Petitioner. JUDGE BECHTLE'S rationale for denying the Motion was that there existed no right for a witness to litigate the propriety of immunity order and therefore, the Judge's function was limited to automatic approval of the immunity grant once it appeared that the requisite application had been filed; the Petitioner disagreed with the Court's limited view of its immunity powers for reasons stated in this Petition supra, Argument II-A. The Third Circuit Court of Appeals, affirming JUDGE

BECHTLE'S refusal to step down, relied upon the provisions of 28 U.S.C.A., Section 455 and concluded that JUDGE BECHTLE'S former job as United States Attorney would not support a conclusion that he had a substantial interest in, had been of counsel in, or was a material witness to that particular case before him, nor, the Court added, was the former United States Attorney so related with any party or counsel as to render his judicial function improper. Initially, the Appeals Court ruling rested upon a poor assessment of the factual question of the extent of BECHTLE'S involvement with the Petitioner during his tenure as United States Attorney. During

BECHTLE'S term, the formal adversary contacts involving the United States Attorney's Office and Petitioner were remarkable in that the number duration and lavishness of the proceedings at which BECHTLE'S office sought to bring Petitioner to justice were only exceeded by the amount of attendant publicity. In addition, the Petitioner was designated as one of three major executives in Philadelphia's organized crime structure for a period of at least a full decade prior to BECHTLE'S assumption of office, see e.g. Senate Report 91-617 accompanying 1970 Organized Crime Control Act where at page 40, PHILIP CHARLES TESTA is designated as "Capodecina" in the

Philadelphia Cosa Nostra. The record reveals, therefore, that PHILIP CHARLES TESTA, far from being one of the innumerable nameless litigants against whom BECHTLE'S office prosecuted civil or criminal actions, was one of, if not the, principal target for criminal prosecution by United States Attorney, BECHTLE. Regardless of the accuracy of the Circuit Court's Finding of Facts, the erroneous legal reasoning adduced to support BECHTLE'S refusal to disqualify himself is the impropriety for which Petitioner seeks review by Writ of Certiorari. The Circuit Court held BECHTLE to be outside the scope of Section 455 because his contact with TESTA, however intense,

did not involve the precise same action then at issue. In fact, reliance upon a Judge's prior involvement in the proceeding at issue as the touchstone for prejudice sufficient to require disqualification ignores this Court's most recent attempts to reliably define those circumstances which would indicate a genuine prejudice sufficient to require removal of the Judge. Ward -v- Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972) involves a defendant's contention that Municipal trials held to impose fines, fees and forfeitures were inherently defective because the Mayor, sitting as Judge, though not directly connected with any of the cases before him within the express terms of 28 U.S.C.A. Section 455, as the public

official charged with raising sufficient revenue for the town budget, had such an intense interest in the amount of funds resulting from the penalties imposed in his Court Room that he necessarily held a "direct, personal, substantial, pecuniary interest" as to bring him within the ambit of Section 455. Failure of the Appeals Court to adopt this common sense approach to defining judicial prejudice in terms of the genuine intensity of the Court's interest in a proceeding rather than by wooden application of the literal terms of Section 455, is certainly an invitation to dilution of Section 455's effect and consequently an apt basis for this

Court's intervention by Writ of Certiorari.

The second procedural infirmity cited by the Petitioner at the August 22, 1973 immunity hearing was that deliberate lies by the United States Attorney calculated to trick Petitioner's counsel into failing to prepare arguments against immunity combined with the presiding Court's denial of a continuance in order to remedy the Government's misconduct, constituted a denial of the Sixth Amendment right to effective assistance of counsel and an abridgement of the Fifth Amendment due process guarantee. Although the Court presiding on August 22, 1973 held that grant of immunity was

virtually a clerical proceeding wherein denial of counsel could not result in prejudice, it hardly requires strenuous argument to support a contention that any proceeding wherein a United States citizen's privilege against compulsory self-incrimination is to be usurped and his right to remain silent is to be revoked with the consequence of continued muteness being imprisonment, is so significant a disposition of the witness' constitutional rights as to require effective assistance of counsel.

C. HAD JUDGE BECHTLE CONDUCTED A HEARING TO REVIEW THE PROPRIETY OF THE IMMUNITY APPLICATION, IT WOULD HAVE APPEARED THAT THE GOVERNMENT'S REQUEST FOR IMMUNITY FAILED TO DEMONSTRATE NECESSITY FOR THE PETITIONER'S TESTIMONY IN THE PUBLIC INTEREST OR A LIKELIHOOD THAT PETITIONER WOULD NOT TESTIFY.

Initially, Petitioner submits that the interrogation to which he was subjected is the result of governmental misconduct so extraordinary as to outweigh whatever public interest there might have been in securing his testimony. Certainly, the subpoena and immunity petition served upon TESTA rested, at least partially, on the fruits of illegal electronic surveillance; and a cursory examination of this Court's Gelbard decision, supra, at page 2361-3, demonstrates the awesome interest of the public in the system for protecting privacy codified in the Fourth Amendment and Title III. Surely, also, questions put to TESTA results from so-called legal electronic surveillance --

i.e., wiretaps ordered pursuant to Title III; but the public's interest in hearing whatever testimony the Petitioner can provide in an inquiry based on those Court-ordered wiretaps must be inconsequential compared to the Commonwealth of Pennsylvania's great interest in prohibiting of electronic surveillance as manifest in 18 Purdons Section 5702, designating precisely the sort of Court-authorized wiretapping to which Petitioner was subjected as a criminal offense.[1/]

1/ Nor does the federal interest override the states; this Court, per Justice White in U.S. -v- Alderman, 394 U.S. 165, 175 (1969) held that states are entitled to legislate more restrictive protection of the right to privacy than encompassed by Title III.

Finally, the Petitioner submits that there can be no public interest in his testimony comparable to the public interest in thwarting attempts by the Government to secure the imprisonment of the citizen by utilizing the civil contempt statute to camouflage a criminal prosecution conducted wholely without the right to counsel, confrontation, jury trial, and indictment, guaranteed in the Sixth Amendment to the United States Constitution. Thus, whatever public interest there might be in the Petitioner's testimony is far outweighed by the public interest in avoiding proceedings such as this which are based upon evidence secured through conduct criminally proscribed by both the state and federal

III. PETITIONER'S PRESENT INCARCERATION FOR THE SECOND TIME RESULTING FROM REFUSAL TO TESTIFY BEFORE A FEDERAL GRAND JURY ABRIDGED HIS SIXTH AMENDMENT RIGHT TO BE FREE FROM DOUBLE JEOPARDY FOR THE SAME OFFENSE.

There can be no dispute that the proceedings involving the witness' subpoena, immunity, and subsequent contempt before the Grand Jury may properly be scrutinized in order to ascertain whether the Government's objective throughout was to secure the criminal penalty of imprisonment by using the less procedurally rigorous approach of a civil proceeding. The United States Department of Justice, in fact, suggested that such a contention would be a probable and "valid" and non-frivolous basis for appeal in its comments on the contempt

governments and directed at successfully achieving a significant erosion in the constitutional protection guaranteed to a criminal defendant.

The Petitioner further notes the failure on the face of the immunity application to demonstrate the requisite expectation of the witness' likely refusal to testify. Since the authorization, without which immunity could not be sought, was secured in March of 1973, it is patently impossible for the Government to have foreseen Petitioner's likely conduct six months in the future.

provision of the 1970 Organized Crime Control Act, See Senate Report 91-617 at page 108-9. Although Lower Courts refused to consider this argument, Petitioner respectfully submits that an examination of the record will disclose that the obvious objective of proceedings was to secure the imprisonment of TESTA and that for purposes of applying the double jeopardy clause, the Government failed to produce sufficient evidence to meet its burden of proving that the misconduct leading to Petitioner's prison incarceration was not identical to the misconduct utilized by the prosecution to secure his imprisonment in 1963.

IV. THE GOVERNMENT'S PROOF THAT THE QUESTIONS POSED TO PETITIONER HAD AN ORIGIN INDEPENDENT OF ILLEGAL ELECTRONIC SURVEILLANCE CONSISTED OF UNCONSTITUTIONAL EVIDENTIARY PRESUMPTIONS, HEARSAY EVIDENCE ADMITTED CONTRARY TO THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND APPLICABLE RULES OF EVIDENCE AND WAS FATALLY FLAWED BY THE GOVERNMENT'S FAILURE TO PRODUCE TRANSCRIPTS OF ILLEGAL ELECTRONIC SURVEILLANCE CONDUCTED AND TESTIMONY BY THE VARIOUS GOVERNMENT AGENTS INVOLVED IN THE INVESTIGATION OF PETITIONER CONTAINING AVERMENTS THAT NO REFERENCE WAS MADE TO THE ILLEGAL WIRETAP TRANSCRIPTS.

In response to Petitioner's contention that the contempt proceeding against him was based upon illegal bugging, the Government can only dispute the witness' contention that his subpoena is tainted by proving either one of two elements necessary to a finding that the investigation of the witness did not result from the illegal wiretaps:

1. The irrelevance of matters discussed in the illegal wiretap to the grand jury investigation at issue or

2. the fact that the transcripts of the illegal electronic surveillance were never disclosed to individuals conducting the grand jury investigation. The Government attempted to establish each element by offering into evidence documents and testimony which were violative of evidentiary rules or constitutional provisions.

Regarding the proof of the irrelevance of illegaly seized conversations to the interrogation of MR. TESTA, the Government relied principally upon the provisions of 18 U.S.C.A. § 3504 (a)(3) which section provided that no evidence may be objected

to on the grounds that it resulted from illegal surveillance if such surveillance occurred more than five (5) years prior to the occurrance of whatever event the proffered evidence was hoped to prove. Simply stated, this section holds as a matter of law that passage of more than five (5) years between illegal wiretapping and the gathering of evidence arguably resulting from that wiretapping, necessisarily precludes any causal connections between the wiretap and the evidence produced five (5) years later. Such a provision arbitrarily designating five years as the point at which causal connection between illegal wiretapping and subsequent investigations abruptly terminates is an archteypal example

of an evidentiary presumption without rational foundation and thus contrary to the due process provision of the Fifth Amendment to the United States Constitution, United States -v- Leary, 395 U.S. 6, 89 S.Ct. 1532 (1969). The Government's reliance upon Section 3504 without producing a scintilla of evidence to demonstrate the validity of setting five years as the limit of relevance between illegal surveillance and subsequent taint is a particularly appropriate subject for this Court's review since the continued use of Court-ordered electronic surveillance is just entering its fifth full year and consequently Section 3504 will soon be the basis of much litigation

in the Lower Courts.

While the Government sought to deny the relevance of prior illegal wiretaps of the Petitioner to the present investigation by resorting to an evidentiary presumption, the Petitioner's request for production of the evidence most probative of any potential relationship between the subject matter of the illegal wiretaps and of the questions propounded to Petitioner - the actual transcripts of conversations illegally seized - was strenuously opposed by the Government and denied in the Lower Courts. The denial of the transcripts was in direct contravention of this Court's holding in Alderman -v-

United States, 394 U.S. 165, 89 S.Ct. 961 at page 972 (1969). There, it was ruled that surrender of transcripts to counsel of parties subject to illegal surveillance was an absolute requisite for a hearing on the question of an independent basis for evidence adduced at proceedings subsequent to the illegal interceptions.

In order to overcome the witness' contention that the questions put to him were tainted, the Government could have sought to prove that the transcripts of illegal wiretaps of which TESTA was the subject were never accessible to the individuals conducting and overseeing the investigation and Grand Jury subpoena; this

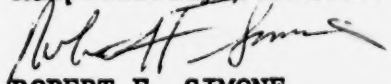
evidence is an alternative to disputing the relevance of illegally seized material to the allegedly tainted evidence as discussed above. In the course of the entire proceeding for review of Petitioner's refusal to testify, the only evidence produced by the United States to establish the inaccessibility of contents of the illegal surveillance to the various investigators assigned to Petitioner, was the testimony of Special Strike Force Attorney, STEPHEN STEIN, that his "gut feeling" led him to believe that none of those investigators had referred to the illegal transcripts. This testimony was a Hornbook example of inadmissible hear-say, Emich Motors

Corp. -v- General Motors Corp., 181 F.2d 70 (7 Cir. 1950).

The one line of evidence introduced by the Government without dispute as to constitutional or evidentiary provisions under which it should have been excluded, was the evidence of recent physical surveillance to which TESTA was subjected. Such evidence, however, is irrelevant since it merely documents occasional observations of TESTA'S whereabouts and never purports to prove any illegal conduct on his part or any likelihood of his possessing information regarding such illegal conduct. As a whole, the evidence which the District Court and Court of Appeals held sufficient to

justify a contempt order appears to contravene the mandate in Alderman, supra, at page 972 that such "hearings are to be more than a formality and Petitioners not left entirely to the reliance of Government testimony..." This Court's assistance is necessary to review the entire process by which these hearings were conducted.

Respectfully submitted,



ROBERT F. SIMONE
Counsel for Petitioner

EXCERPT FROM THE HEARING OF AUGUST 22, 1973, CONTAINING HON. LOUIS C. BECHTLE'S RULING GRANTING IMMUNITY (N.T. 17-18)

THE COURT: All right. Well, I think the Court's obligation in respect to the request for immunity is relatively limited. If the United States Attorney requests it and it is approved by someone in Mr. Petersen's capacity, and if it is stated that it is in the public interest to grant the immunity, and if it is in respect to a Grand Jury proceeding, which it is, the Court's and my responsibility, which I think is far beyond the possible limits of any concept of prejudice, is to see if the request is in such statutory form and in order, and the Court concludes that it is. I am inclined to provide

Mr. Simone with an opportunity on any proceedings other than the immunity that may result from the Court's grant of immunity which is about to be approved.

Now, Mr. Stein, if proceedings other than this grant of immunity and requirement that Mr. Testa appear before the Grand Jury and submit to questioning - I say "further proceedings" -- result from that, I am inclined to think that Mr. Simone would be entitled to a brief recess, possibly a week, to prepare himself and his client for the issues raised at those proceedings, particularly in light of the search Mr. Simone is making of the possibility of electronic surveillance bearing upon Mr. Testa's testimony which would be evidence before the Grand Jury under the decisions.

So the Court's ruling is the motion that the Court disqualify itself in respect to the petition before it which is only a petition at this time for immunity, that motion is denied.

The Government's motion seeking immunity for Phillip Charles Testa is granted and at this time I would like Mr. Testa to appear before the bar of the court so I can read the order to him.

Mr. Testa?

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNA.

IN RE: GRAND JURY INVESTIGATION
PHILIP CHARLES TESTA, A WITNESS

MISCELLANEOUS NO. 73-169

O R D E R

AND NOW, this 12th day of SEPTEMBER, 1973, PHILIP CHARLES TESTA, a witness summoned to testify, having been granted immunity pursuant to the authority of Title 18, United States Code, Section 6002 and 6003, and ordered by this Court to answer the questions presented, refuses without just cause shown to comply with the Order of the Court to testify before the Grand Jury of the United States now sitting, and after the Court having

held hearings thereon with the witness and his counsel being present, it is

O R D E R E D

that the said witness, PHILIP CHARLES TESTA, be adjudged in civil contempt of this Court in the presence of the Court, pursuant to the provisions of Title 28, United States Code, Section 1826.

It is the further order of the Court that the witness, PHILIP CHARLES TESTA, be and he is committed to the custody of the United States Marshal to be confined at a suitable place of confinement until such time as the witness is willing to give such testimony; said confinement not to exceed the term of the Grand Jury, including extensions, before which said refusal occurred, but in no event to

exceed eighteen months.

/s/ John Morgan Davis
John Morgan Davis, J.

EXCERPT FROM THE NOTES OF TESTIMONY OF THE HEARING HELD SEPTEMBER 12, 1973 (N.T. 166-7) CONTAINING THE COURT'S DECISION TO HOLD PETITIONER IN CONTEMPT

THE COURT: Well, since you will not obey my order, I will have to find you in contempt of this Court. Now, in accordance with In Re Egan and this very recent case of the Circuit Court of Appeals and the Gelbard case, I find that there was an independent basis aside from that illegal surveillance to raise the questions which were asked you before the Grand Jury, and there was no taint in those questions that were asked of you and which you refused to answer in disobedience to my order. I have no alterna-

tive except to find that you are in civil contempt of this Court, and, on that basis, I simply have the option of sentencing you to prison not to exceed a period of 18 months, and, of course, the life of the Grand Jury, but, in no event, shall your confinement exceed 18 months and, of course, at any time during that period that you wish to testify before this Grand Jury, you can purge yourself of the contempt that you have at the present time displayed toward this Court.

So, I am going to issue the order and I'm sorry that you wish me to change the order submitted by the Government, because I think it is a proper order and I shall sign it.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 73-1796

IN RE: GRAND JURY INVESTIGATION
PHILIP CHARLES TESTA, Witness

PHILIP CHARLES TESTA,
Appellant

(D.C. Misc. No. 73-169)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and HUNTER and WEIS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that

the judgment of the said District Court, filed September 12, 1973, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn

Clerk

October 25, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1796

IN RE GRAND JURY INVESTIGATION
PHILIP CHARLES TESTA, Witness

PHILIP CHARLES TESTA,
Appellant

Appeal from the United States District Court for the Eastern District of Pa.

Argued September 26, 1973

Before SEITZ, Chief Judge, HUNTER and WEIS, Circuit Judges

Robert F. Simone
Attorney for Appellant

Robert E. J. Curran
United States Attorney
Kenneth A. Bravo
Stephen Stein
Special Attorneys
United States Department
of Justice

OPINION OF THE COURT

(Filed OCT. 25, 1973)

HUNTER, Circuit Judge:

This is an appeal from an order issued September 12, 1973 by Judge John Morgan Davis of the District Court, Eastern District of Pennsylvania, which holds the appellant in civil contempt for refusing to answer questions before a grand jury after he had been given immunity under 18 U.S.C. § § 6002, 6003 (Supp. 1973). The order has committed him to prison without bail until he agrees to testify before the grand jury. An application for release on bail pending determination of this appeal was denied by this court on September 14, 1973.

The appellant raises several

objections to the civil contempt order. His most substantial claims are: first, that the immunity order, issued August 22, 1973, is ineffective because the judge who issued it was not impartial and should have disqualified himself; and second, that the appellant had the right to refuse to answer the questions propounded because they were based on wiretaps by the government which were admittedly illegal. We have concluded that these claims are not meritorious and affirm the order of the district court.

The appellant appeared before the grand jury on August 22, 1973 and refused to answer all questions (other than his name and address) invoking his rights under the Fourth and Fifth Amendments of

the Constitution. He was immediately brought before District Judge Louis C. Bechtle[1] who, pursuant to a petition of the Government, signed an order granting him immunity. The appellant was then directed to make another appearance before the Grand Jury, where he once again refused, on Constitutional grounds, to answer any questions other than his name and address. The Government's successful petition for an Order of civil contempt was brought before Judge Davis as a result of this second refusal to testify.

I

The appellant's first contention is that the order of Judge Bechtle granting him immunity should be held ineffective, because the Judge was not impartial. As a result,

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[1] The Judge previously assigned as Emergency Judge for the District Court, Eastern District of Pennsylvania, for the week of August 20, 1973.

the appellant claims he was within his rights when he continued to refuse to answer the questions on constitutional grounds. This claim is based on the fact that prior to Judge Bechtle's appointment to the bench, he was United States Attorney for the Eastern District of Pennsylvania. During his tenure, the office conducted several investigations of the appellant and brought at least one prosecution against him.

The statutory basis for disqualification is 28 U.S.C. §455 (1970).[2] The section reads as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

and under that section a federal judge must disqualify himself in any case in which he has been "of counsel." Included within the term "of counsel" is the United States Attorney for any criminal prosecution in his district. United States v. Amerine, 411 F. 2d 1130, 1133 (6th Cir. 1969); United States v. Vasilick, 160 F. 2d 631 (3d Cir. 1947). However, the clause is applicable only if the judge is asked to hear the same case in which he has been of counsel, Gravenmier v. United States, 469 U.S. 66 (9th Cir. 1972) [sic] United States v. Vasilick, supra, and that is not the situation before us now.

The earlier prosecution of the appellant and any investigations which

were related to them [sic] are clearly different cases. Moreover, if any of the prior investigations to which appellant refers were unrelated to his earlier prosecutions, they did not result in any arrest or indictment during Judge Bechtle's tenure as United States Attorney (nor have they since). Therefore, they were not related to any "case" as that term is used in § 455. United States v. Wilson, 426 F. 2d 268 (6th Cir. 1970). As a result, Judge Bechtle was never "of counsel" in this case and mandatory disqualification on this basis is not required.

Nor do we believe that the judge need necessarily have disqualified himself under the "substantial interest" clause of 28 U.S.C. § 455 (1970). First,

this clause is concerned primarily with pecuniary and beneficial interest, United States v. Bell, 351 F. 2d 868, 878 (6th Cir. 1965); Adonis v. United States, 302 F 2d 307, 310 (5th Cir. 1962), so that at the outset it has only arguable relevance to Judge Bechtle's purported interest.

Second, the appellant contends no more than that Judge Bechtle was United States Attorney during a period in which he was prosecuted and investigated. He does not contend that, as a result, the Judge has a special interest in the outcome of this case. We agree with the Ninth Circuit that the mere fact that a judge was United States Attorney when an unrelated prosecution or investigation occurred does not by

itself establish a "substantial interest" under § 455. Gravenmier v. United States 469 F 2d 66 (9th Cir. 1972). We refuse to adopt such a per se, mandatory disqualification rule in this area.

Finally, we should point out that the only function performed in this case by Judge Bechtle was to issue the immunity order under 18 U.S.C. § 6003 (Supp. 1973). Under the language of this section the judge is required to issue the order when it is properly requested by the United States Attorney. He is given no discretion to deny it. See Licata v. United States 429 F.2d 1177, 1179 (9th Cir. 1970) (interpreting 18 U.S.C. § 2514, an analogous immunity statute). As a result, even if we were

to assume that Judge Bechtle had a special interest in these proceedings, he could not in fact have affected them, given his purely ministerial function. We conclude that Judge Bechtle's refusal to disqualify himself does not require reversal.[3]

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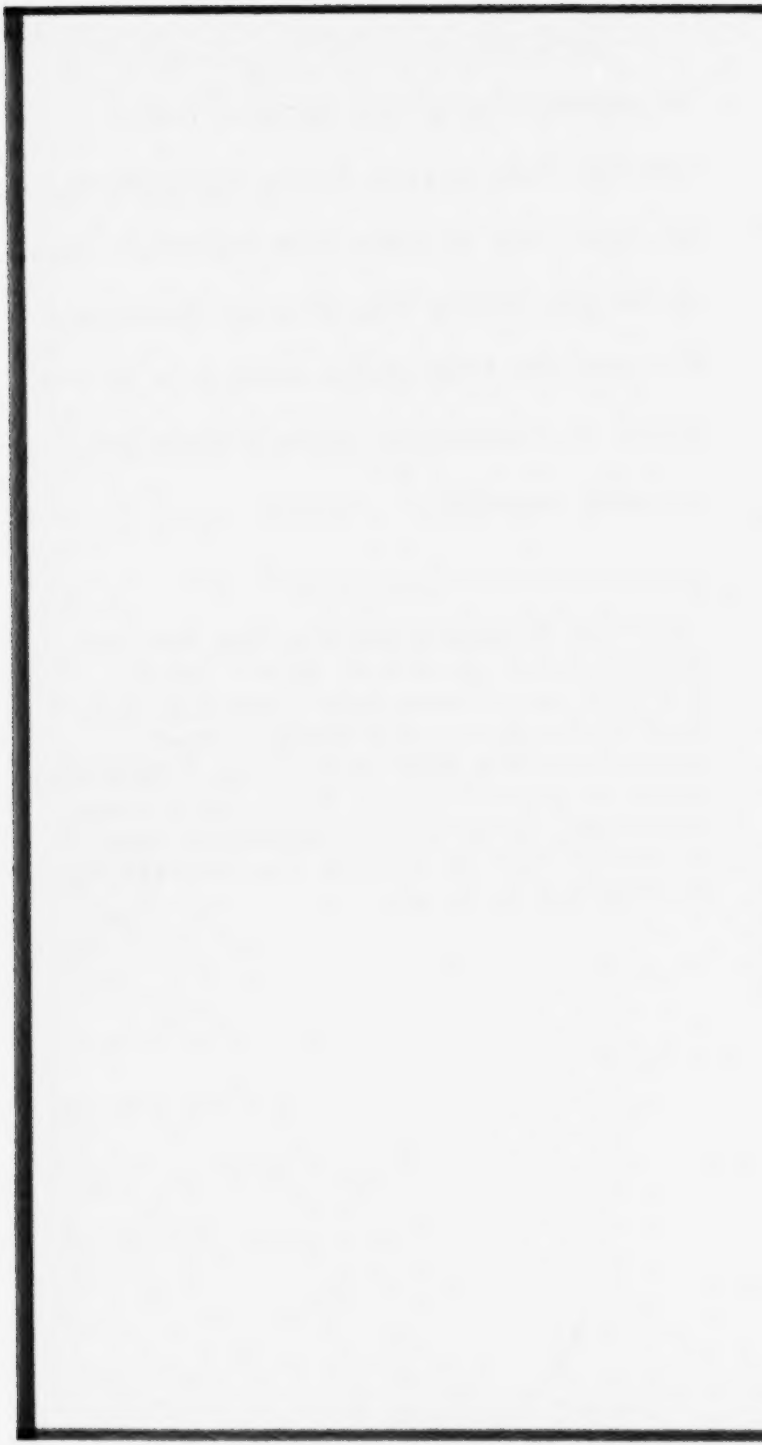
[3] Even if disqualification was not required under 28 U.S.C. §455, Judge Bechtle could have exercised his discretionary power and disqualified himself on his own initiative. However, since no prejudice in fact could have occurred, given his ministerial role, we cannot say he abused his discretion in failing to do so.



II

The appellant's second contention is that he cannot be held in civil contempt for his failure to respond to the questions asked since they were based, in part, upon illegal wiretaps maintained by the government. Gelbard v. United States, 408 U.S. 41 (1972). While the government admitted that it maintained a number of illegal wiretaps until July 1965, it went on to establish, to the satisfaction of the district court, that the questions were not based on these illegal wiretaps and that therefore they provided no basis for the appellant's refusal to testify, after he had been given immunity. The appellant contends that this holding is erroneous.

Once the government has admitted the existence of illegal wiretaps, it must establish, by a preponderance of the evidence,[4] "an independent basis, aside from the illegal surveillance, upon which to justify the questions propounded before the grand jury." In re Egan, 450 F2d. 199, 216 (3d Cir. 1972), aff'd sub nom. Gelbard v. United States, 408 U.S. 41 (1972). In order to establish an "independent basis" here, the government introduced as evidence more recent, legal surveillance reports of the Federal Bureau of Investigation which it claims were the basis of the questions. Most of these surveillances

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[4] United States v. Cole, 463 F.2d 163, 172 (2d Cir. 1972); United States v. Cohen, 358 F.Supp. 112, 118 (S.D.N.Y.

took place in 1972 and 1973, the time period in which the events about which the appellant was questioned occurred, and most were physical sightings of the appellant meeting with various individuals. The government attorney in charge of the grand jury investigation also testified that he had not read the logs of the illegal wiretaps and that they had no effect on the questions asked the appellant. We believe this evidence was sufficient to permit the district court to find that the government had met its burden and established an "independent basis, apart from the illegal surveillance" for the questions asked.[5]

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[5] While we find that the district court's evidentiary determination was correct

The appellant seeks to refute this demonstration of an "independent basis" by pointing out tha the possibility of taint by the illegal wiretaps is not excluded by this evidence. He urges that the Federal Bureau of Inves-

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5 con't.

and affirm on that basis, we also note that 18 U.S.C. § 3504, enacted as part of the Organized Crime Control Act of 1970, has application to the factual situation presented here. The statute provides:

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--

* * * * *

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act."

tigation agents who carried out the legal surveillances may have themselves used the illegal material. However, the government's proof need not preclude every possibility of taint. See Bufalino v. Immigration and Naturalization Service, 473 F.2d 728, 734 (3d Cir. 1973). Indeed, as the Supreme Court has stated:

> "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." Nardone v.

5 (con't.)

In this case the illegal surveillance ended in July 1965 and the interrogation of the witness related to 1972 and 1973 events. This being the case, the statute operates to preclude the claim of inadmissibility.

United States, 308 U.S. 338, 341 (1939) (emphasis added).

In the case before us, only the possibility of a causal connection between the illegal taps and the questions has been demonstrated by the appellant. Moreover, all of the questions asked related to specific events which occurred in 1972 and 1973, the period of time in which most of the legal surveillance of the appellant, relied on by the government took place.[6] The illegal taps, by contrast, ended in 1965. As a result, the

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5 (con't.)

However, constitutional questions may be involved in the application of this section, see, Gelbard v. United States, 408 U.S. 41, 53-54n.11 (1972); In Re Evans, 452 F.2d 1239, 1248n.32, (D.C. Cir. 1971). In addition, we do not have the benefit of the district court's view on these issues since it chose to rely solely on its evidentiary determination in deciding the case. As a result, we do not rely upon § 3504 as the basis for our decision in this case.

6 A much smaller amount of this legal surveillance occurred in 1970.

likelihood that the questions were tainted by the illegal taps is small; any taint which might exist is in all likelihood sufficiently attenuated; and therefore the possibility, raised by the appellant, that the Federal Bureau of Investigation agents used the illegal material does not persuasively refute the government's evidence. Therefore, the conclusion of the district court that there was no taint is entirely proper since it could reasonably have concluded that a preponderance of the evidence indicated an independent, legal basis for the questions.[7]

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[7] In this appeal, the appellant raises as a further objection the possibility that subpoena [sic] which compelled him to appear before the grand jury was itself tainted by the illegal wiretaps. This assertion

The appellant also argues that the district court's finding of an in-

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7 con't.

is based on the fact that the decision to subpoena was made by three government attorneys, and, as to two of them, no evidence was introduced to indicate whether or not they had used the illegal material.

This possibility has no effect on our conclusion with regard to the claim that the questions were tainted. The allegation of a tainted subpoena is separate from the allegation of tainted questions and does nothing to reinforce or strengthen appellant's argument on the issue discussed in the text, supra.

Moreover, with regard to the question of a tainted subpoena itself, it is somewhat doubtful whether the appellant can raise it at all, since he seems to have waived this objection. He made no attempt either to quash the subpoena prior to his appearance, United States v. Seeger, 180 F.Supp. 467 (S.D.N.Y. 1960), or to object to it after he had appeared before the grand jury but prior to the start of his substantive examination. However, even if this question is properly before us, we feel that the evidence which establishes an independent basis for the questions, demonstrates an adequate independent basis for the subpoena, as well.

dependent basis for the questions must be reversed because Judge Davis refused to review the illegal material in camera. As a result, the appellant claims that an intelligent decision on the issue was impossible. This claim is without merit. While in some case [sic] the district court may find it necessary to review the illegal wiretap material, there will undoubtedly be other cases where the weight of the evidence will establish an independent basis with sufficient clarity to permit a ruling without a review of the illegal material. The necessity for first-hand in camera inspection is properly left to the discretion of the district court. There was no

abuse of that discretion here.

III

Finally, the appellant makes the following contentions. First, he claims the government called him before the grand jury not to obtain information, but rather because they wished to harass and imprison him. Second, he claims that his right to be free from double jeopardy is violated, since he was cited for civil contempt in 1963 for failure to answer questions before another grand jury which, like this one, was investigating organized crime. Third, he contends the district court abused its discretion by finding him in civil contempt and imprisoning him. We have considered each of these claims and find they are without merit.

The order of the district court holding the appellant in civil contempt will be affirmed.

TO THE CLERK

Please file the foregoing opinion.

/s/ James Hunter

JAMES HUNTER, III, Circuit Judge

AFFIDAVIT OF SERVICE

I, JAMES T. VERNILE, on January 23, 1974, served three copies of this Petition for Certiorari on the Solicitor General, Department of Justice, Washington, D.C. and one copy on Steven Stein, Esq., Special United States Attorney, Room 2030 P.N.B. Building, Broad and Chestnut Streets, Philadelphia, Pennsylvania, by First Class Mail, Certified, Return Receipt Requested.

James T. Vernile
JAMES T. VERNILE

Sworn to and Subscribed:
before me this 23 day:
of January , 1974:

Marianne Ricardi
NOTARY PUBLIC

Notary Public, Philadelphia, Philadelphia
My Commission Expires March 11, 1975

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538-982—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1146

PHILIP CHARLES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the failure of the court of appeals to dispose of his appeal from a civil contempt determination within 30 days requires vacation of the grand jury subpoena, the immunity order, and the order of confinement; (2) that the immunity order was improper (a) because the judge who issued it should have recused himself, (b) because a government misrepresentation as to when an immunity order would be requested deprived petitioner's counsel of time to prepare for the immunity hearing, (c) because the judge did not permit him to raise certain objections at that hearing, and (d) because the government did not demonstrate sufficient public interest in petitioner's testimony and the likelihood that he would

refuse to testify; (3) that petitioner's confinement for refusal to testify was precluded by his confinement ten years previously for refusal to testify before a grand jury investigating different matters; and (4) that the questions asked in the grand jury hearing were tainted by illegal wire interceptions which occurred more than seven years previously.

Petitioner, an immunized witness before a special grand jury, was ordered confined for civil contempt by the United States District Court for the Eastern District of Pennsylvania for refusing without just cause to comply with an order of the court to testify, as provided by 28 U.S.C. 1826(a). The period of confinement was to last until such time as petitioner is willing to testify, such period not to exceed the life of the grand jury, and in no event for longer than 18 months. The court of appeals affirmed (Pet. 105–125).

The relevant facts are set forth in the opinion of the court of appeals (Pet. 106, 107–108). Briefly, they show that on August 22, 1973, petitioner was called as a witness before a special grand jury sitting in Philadelphia, Pennsylvania; he was asked questions concerning the grand jury's investigation into credit extortion, interstate racketeering, illegal gambling, income tax evasion, and distribution of illegal drugs; he refused to answer these inquiries, invoking his privilege against self-incrimination and the Fourth Amendment (Transcript of August 22, 1973, pp. 5–6, 28–35). Petitioner was then immediately brought before the emergency judge for that week, United States District Judge Louis C. Bechtle, who granted the government's request that petitioner be given use im-

munity pursuant to 18 U.S.C. 6002 and 6003. Petitioner again refused to testify on constitutional grounds, and a hearing was held before United States District Judge John Morgan Davis on the government's petition for an order holding petitioner in civil contempt. The hearing began on September 5, 1973, and ran intermittently until September 12, 1973. On that date, after finding that there was no just cause for petitioner's refusal to testify, Judge Davis ordered petitioner to return to the grand jury and testify. Petitioner returned to the grand jury, but he still refused to testify, and Judge Davis thereupon ordered him confined for civil contempt (Transcript of September 12, 1973, pp. 136–142, 166–167).

1. Petitioner contends that the failure of the court of appeals to dispose of his appeal from the order of confinement for civil contempt within 30 days requires vacation of the grand jury subpoena, the immunity order, and the order of confinement (Pet. 46–61).

The order of confinement was issued on September 12, 1973, and the notice of appeal was filed on September 13, 1973. The court of appeals issued its opinion and judgment affirming the district court on October 25, 1973, twelve days after the expiration of the 30-day period. While 28 U.S.C. 1826(b) states that the appeal "shall be disposed of * * * not later than thirty days from the filing of such appeal," it does not indicate what happens if the court of appeals acts a few days beyond the 30-day period. Petitioner has cited nothing in the legislative history of the statute nor any case supporting the contention that failure to dispose of the appeal within 30 days automatically

vacates the order of confinement, much less the subpoena and the immunity order.

Charleston v. *United States*, 444 F. 2d 504 (C.A. 9), petition for certiorari dismissed, 404 U.S. 916 (cited by petitioner, Pet. 53), does not deal with the issue. Rather, the court there assumed that the 30-day limit was mandatory rather than directory and that it was constitutional, in deciding that a contempt conviction must be affirmed when there was not sufficient time to convene a court *en banc* (444 F. 2d at 506). *Reed* v. *United States*, 448 F. 2d 1276 (C.A. 9), merely relied on *Charleston*. Neither of these cases considered the effect of a failure to dispose of the appeal within 30 days. On the other hand, two circuits have decided appeals after the expiration of the 30 days, expressly noting that fact. *Beverly* v. *United States*, 468 F. 2d 732, 742 (C.A. 5); *In re Tierney*, 465 F. 2d 806, 809 (C.A. 5), certiorari denied *sub nom. Tierney* v. *United States*, 410 U.S. 914; *United States* v. *Doe*, 460 F. 2d 328, 332, n. 3 (C.A. 1), certiorari denied *sub nom. Popkin* v. *United States*, 411 U.S. 909. It was not suggested in these cases that the late decision might vitiate the order of confinement; such a drastic result would be inconsistent with the clear intent of Congress to permit district courts to confine witnesses who refuse to obey lawful orders to testify.

Moreover, petitioner has not suffered any prejudice from the delay by the court of appeals. Had the case been decided on time, petitioner would have passed those 12 days as he actually did pass them; the delay made no difference. "[D]elay in appeal is not truly

prejudicial except in case of reversal." *United States* v. *Cifarelli*, 401 F. 2d 512, 514 (C.A. 2), certiorari denied, 393 U.S. 987. Arguably, petitioner may have been entitled to release from confinement during the period of delay in excess of 30 days in the court of appeals. Any such claim has, of course, been mooted by the affirmance of the contempt adjudication.

2. Petitioner contends that the grant of immunity was improper for several reasons:

a. Petitioner's contention (Pet. 71–78) that Judge Bechtle should have recused himself from the immunity hearing was rejected in the opinion of the court of appeals, upon which we rely (Pet.108–114).[1]

b. Petitioner contends that he was deprived of his right to effective assistance of counsel at the immunity hearing by virtue of a misrepresentation by government counsel (Pet. 69–71, 78–79).

The day before the immunity hearing, the government attorney told petitioner's counsel that it would probably take weeks to obtain authorization for the immunity application from Washington. Actually, the authorization had been obtained in advance. The government attorney explained this misrepresentation

[1] The court of appeals correctly refused to adopt an inflexible rule requiring that a judge who has been a United States Attorney disqualify himself in all cases involving defendants who were subjects of prosecutions or investigations by the United States Attorney's office while he was in office. The petitioner did not allege that Judge Bechtle had any special interest in the outcome of this case. In any event, as the court noted, his function in issuing the immunity order was purely ministerial, so that any special interest he might have had in the proceedings could not have affected petitioner adversely (Pet. 108–114).

from the witness stand at the hearing before Judge Davis (Transcript of September 12, 1973, pp. 155-156):

> * * * I felt I could not tell you or your client that we had already received immunity because for three and one-half months the Federal Bureau of Investigation had a heck of a time finding Mr. Testa to serve the subpoena and, once we did serve the subpoena, I felt in my own mind that if he knew we had immunity [authorization], and the FBI agreed with me, he would not have shown up and we would have had a heck of a further time to find him. That is why I did not tell you that we had already received immunity [authorization].

Regardless of the propriety of this misrepresentation, petitioner has not demonstrated that he was prejudiced thereby. Petitioner was represented by counsel at the immunity hearing, even though this is not required. See *In re Kilgo,* 484 F. 2d 1215, 1221 (C.A. 4); *United States* v. *Handler,* 476 F. 2d 709, 714 (C.A. 2). Counsel's alleged lack of preparation for the immunity hearing did not prejudice petitioner, because the court's action in granting immunity is largely ministerial. *In re Kilgo, supra,* 484 F. 2d at 1221. A prospective witness' only interest at the immunity hearing is to assure himself that the order is an effective grant of immunity. This interest was satisfied when petitioner observed the court sign a valid order. In any event, petitioner was afforded the opportunity to challenge the propriety of his immunization at his

contempt hearing, and he was given a further opportunity to testify after the court ruled against him (Transcript of September 12, 1973, p. 136).[2] Therefore, government counsel's misrepresentation did not prejudice petitioner or taint the validity of the subsequent contempt proceedings.

c. Petitioner's contention (Pet. 62–68) that the immunity hearing was improper because the court did not permit him to litigate certain objections is without merit. The issue whether in a particular case 18 U.S.C. 2515 (the wire interception statute) provides just cause for a refusal to testify before a grand jury is not a proper subject of litigation at an immunity hearing. Cf. *Gelbard* v. *United States*, 408 U.S. 41. An immunity petition does not disclose the existence of wire interceptions or recite evidence derived therefrom; it is merely an assertion that the government desires to ask a witness questions. Moreover, petitioner was not prejudiced, since he fully litigated his Section 2515 claim at the contempt hearing and was given an additional opportunity to comply with the order to testify after the court made its ruling (Transcript of September 12, 1973, p. 136).

d. Petitioner contends that the immunity grant was improper because the government did not demonstrate the public interest in petitioner's testimony or the likelihood that he would not testify (Pet. 79–83).

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[2] Petitioner was not permitted to relitigate at the contempt hearing the issue whether Judge Bechtle should have recused himself. However, this issue was considered in the court of appeals.

18 U.S.C. 6003 provides that a United States Attorney may request an immunity order when "in his judgment" the testimony of the witness may be necessary to the public interest, and the individual has refused or is likely to refuse to testify on the basis of the Fifth Amendment. At the time the immunity application was authorized by the Assistant Attorney General, petitioner had not yet been called before the grand jury.[3] But when the court was asked to grant immunity, petitioner had already refused to testify (Transcript of August 22, 1973, pp. 22–23). As to the public interest requirement, the court found that the United States Attorney considered it to be in the public interest for petitioner to testify (Transcript of August 22, 1973, p. 23). The court may not review the United States Attorney's exercise of judgment as to what is in the public interest,[4] and the government is

[3] The United States Attorney could at that time reasonably have concluded that petitioner was likely to refuse to testify, since he had gone to prison in 1963, rather than testify. Furthermore, the government had unsuccessfully attempted to serve a grand jury subpoena on petitioner for almost three and one-half months before he was finally served (Transcript of September 12, 1973, p. 144). The U.S. Attorney could also conclude, based on his knowledge of matters to be presented to the grand jury, that petitioner's testimony would be necessary.

[4] In *United States* v. *Handler*, 476 F. 2d 709, 715 n. 7 (C.A. 2) (presumably the recent Second Circuit case mentioned at Pet. 644), the court asserted in dictum that a defendant has a "continuing right to petition the district court for release if * * * the public necessity that led to the grant of immunity and the order to testify should cease to exist." We do not doubt that in a proper case the court could ask the United States Attorney if in his judgment the public necessity had ceased to

not required to present evidence in support thereof. *In re Kilgo, supra,* 484 F. 2d at 1218–1219.[5]

3. Petitioner's contention (Pet. 84–85) that his imprisonment for refusal to testify before a grand jury in 1963 precludes his imprisonment for refusal to testify in 1973 is without merit. The events being investigated in 1973 were not the same as those being investigated in 1963 (Pet. 119 n. 5). However, even if the events were the same, and indeed, even if the questions were identical, the prohibition against double jeopardy would not prevent the civil contempt commitment from being continued or reimposed if petitioner continued to refuse to obey the court's order to testify. *Shillitani* v. *United States,* 384 U.S. 364, 371 n. 8.

4. Petitioner contends that he had just cause for refusal to testify because the government failed to prove that the questions were not tainted by admittedly illegal wire interceptions that had taken place seven years previously (Pet. 86–94).

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exist; but Congress has made it clear that it is the judgment of the United States Attorney, and not that of the court, which should prevail. See *In re Kilgo, supra,* 484 F. 2d at 1218—1219. The Second Circuit's dictum should not be interpreted as rejecting that principle.

[5] Petitioner's contention (Pet. 81) that the interest of Pennsylvania in preventing wire interceptions in the Commonwealth is superior to that of the United States in investigating organized crime is erroneous. It is well settled that agents of the United States engaged in governmental activities are immune from state regulation unless Congress affirmatively provides otherwise. *Mayo* v. *United States,* 319 U.S. 441, 448. Congress has not provided that the states may prohibit electronic surveillance by FBI agents or the use of evidence derived therefrom in federal courts. See 18 U.S.C. 2510 *et seq.*

The court of appeals correctly noted that there was sufficient evidence to support the district court's finding that there was an independent basis for the questions asked, and that the bare possibility of taint was insufficient to impugn that finding (Pet. 115–124).

Furthermore, regardless of the accuracy of the district court's factual finding, petitioner's claim on this issue must fail because 18 U.S.C. 3504(a)(3) precludes him from raising the question whether illegal wire interceptions which took place in 1965 taint questions relating to events which occurred more than five years later, in 1972 and 1973. The doubts expressed by the court of appeals about the constitutionality of this section (Pet. 117–120, n. 5) were resolved, at least in the grand jury setting here involved, by this Court in *United States* v. *Calandra,* No. 72–734, decided January 8, 1974. *Calandra* held that a witness summoned to appear and testify before a grand jury has no Fourth Amendment right to refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. Therefore, any claim which petitioner may have that he may not be compelled to answer questions based on illegal wire interceptions would have to be derived solely from the wire interception statute. See *United States* v. *Calandra,* slip op., p. 17 n. 11. However, by enacting Section 3504(a)(3), Congress has removed the right of petitioner to make a claim based upon these seven-year-old wire interceptions. Since petitioner has no constitutional right and no statutory right to chal-

lenge these old wire interceptions, he cannot raise them as just cause for his refusal to testify.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[6] *Leary* v. *United States*, 395 U.S. 6 (cited at Pet. 89), is inapposite. In that case, Congress attempted to supply proof of a fact necessary for conviction by means of a presumption which the Court found to be irrational, and this was held to be a violation of the defendant's constitutional rights. In the instant case, Congress has simply taken away a statutory right to make a claim regarding evidence derived from wire interceptions.

CERTIORARI DENIED

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